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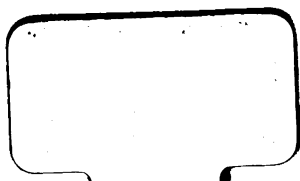


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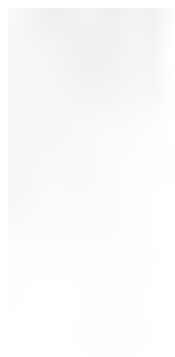


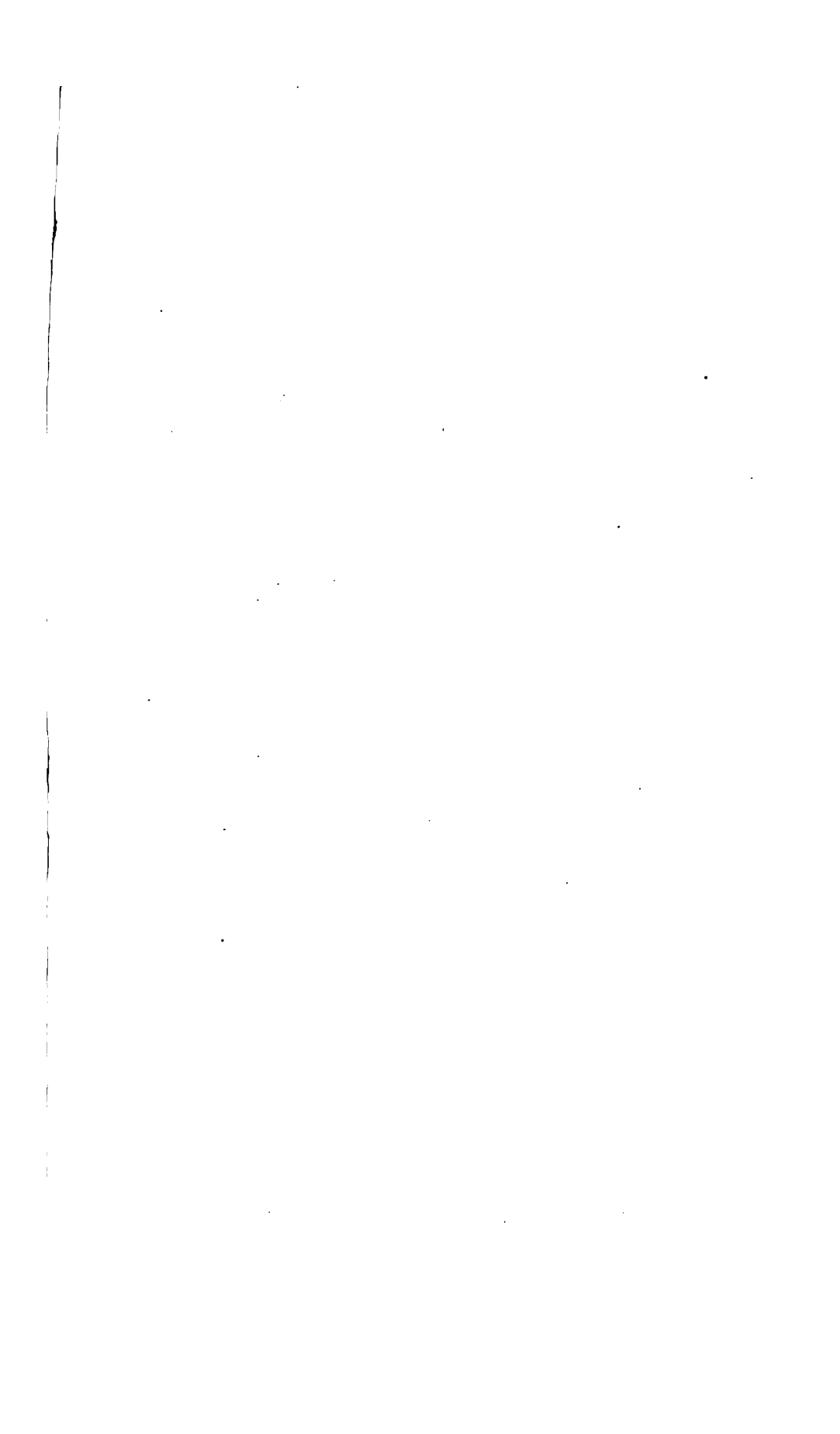
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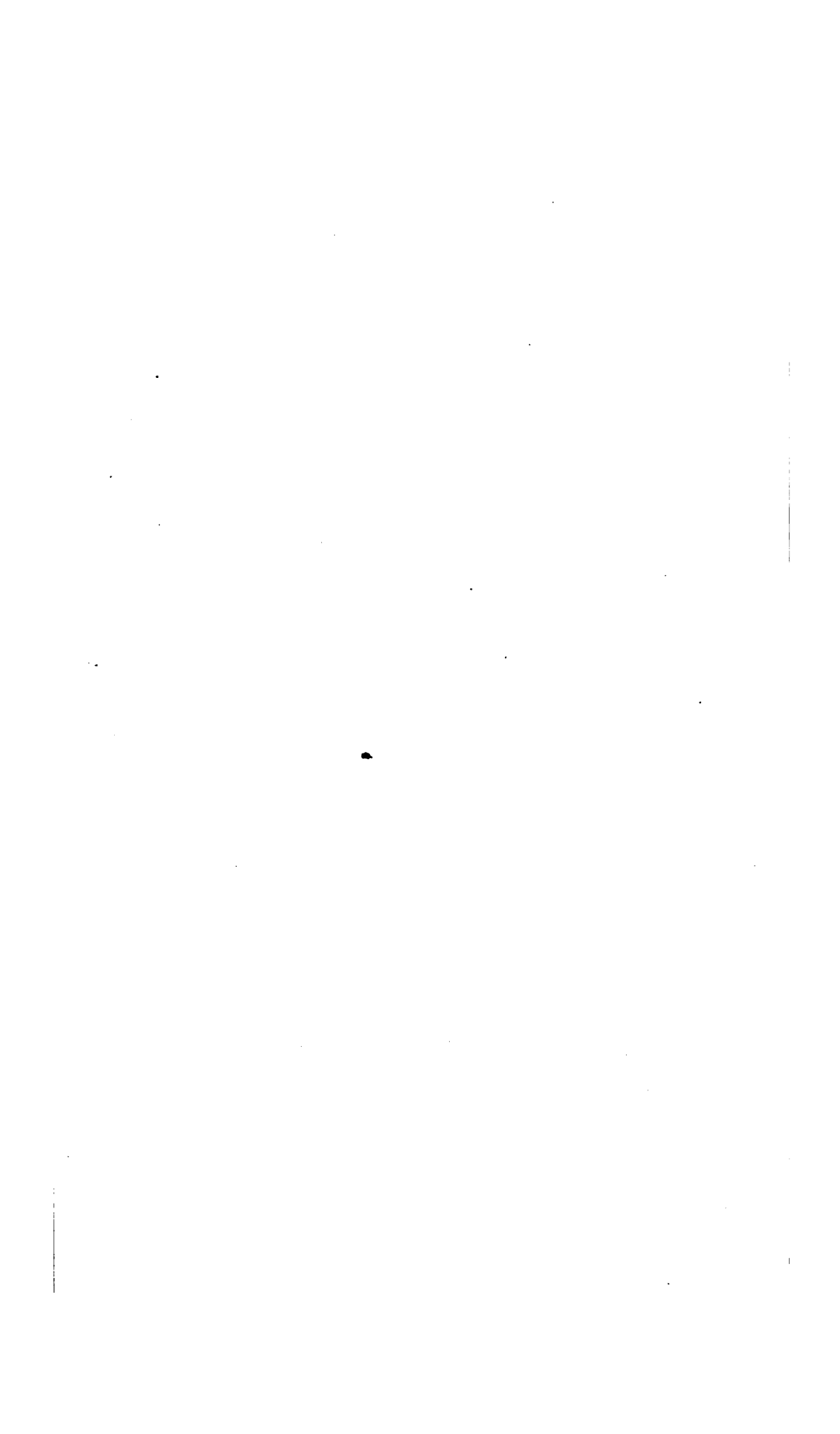
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REPORTS OF CASES

DETERMINED IN

The Supreme Court

OF THE

STATE OF NEVADA,

DURING THE YEAR 1872.

REPORTED BY

ALFRED HELM, CLERK OF SUPREME COURT,

AND

THEODORE H. HITTELL, Esq.

Volume VIII.

SAN FRANCISCO:

FRANK EASTMAN, PRINTER, No. 509 CLAY STREET.

1873.



Justices of the Supreme Court.

HON. B. C. WHITMAN.....CHIEF JUSTICE.

“ *THOS. P. HAWLEY, }
“ †C. H. BELKNAP, } ASSOCIATE JUSTICES.

Officers of the Court.

HON. L. A. BUCKNER.....ATTORNEY GENERAL.

ALFRED HELM.....CLERK.

S. T. SWIFT.....BAILIFF.

* HAWLEY, J., was elected at the November election, A. D. 1872, and took his seat first Monday in January, A. D. 1873.

† GARBER, J., resigned November 7, 1872, and BELKNAP, J., was appointed to fill the vacancy until the next general election.

District Judges.

First District.....	HON. RICHARD RISING.
Second District.....	HON. C. N. HARRIS.
Third District.....	HON. W. M. SEAWELL.
Fourth District.....	HON. O. R. LEONARD.
Fifth District.....	HON. BENJ. CURLER.
Sixth District.....	HON. D. C. MCKENNEY.
Seventh District.....	HON. MORTIMER FULLER.
Eighth District.....	HON. W. H. BEATTY.
Ninth District.....	HON. J. F. FLACK.

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RULES
OF
THE SUPREME COURT
OF THE
STATE OF NEVADA.

RULE I.

Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) twenty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored the dismissal shall be final, and a bar to any other appeal from the same order or judgment.

RULE IV.

On such motion, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of the filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this court shall be on paper of uniform size, according to a sample to be furnished by the clerk of the court, with a blank margin one and half inches wide at the top, bottom, and side of each page; and the pleadings, proceedings, and statement shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding, and of the testimony of each witness, and shall have, at least, one blank or fly-sheet cover.

Marginal notes of each separate paper, order, or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the clerk of the court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing, and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the

first day of the term, unless by written consent of the parties; *provided*, that all cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes from the same judicial district shall be placed together, and all the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that causes in which the people of the State are a party shall be placed at the head of the calendar.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the clerk a copy of his own for each of the justices of the court, or may, one day before the argument, file the same with the clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the court; but each defendant who has appeared separately in the court below may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the court below shall be issued until the expiration of the ten days herein provided, and decision upon the petition, unless upon good cause shown, and upon notice to the other party, or by written consent of the parties, filed with the clerk.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No paper shall be taken from the court-room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a *superseas*. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree, which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

APRIL TERM, 1872.

THE STATE OF NEVADA, RESPONDENT, *v.* EUREKA
CONSOLIDATED MINING COMPANY *et als.*, APPEL-
LANTS.

TAXES ON PROCEEDS OF MINES—WHEN THE “FIFTEEN DOLLARS PER TON” EX-
EMPTION APPLIES. The act of February 28, 1871, for the taxation of the net pro-
ceeds of mines, (Stats. 1871, 87) in providing “that an additional exemption of
fifteen dollars per ton may be allowed on all ores worked by Freiburg or dry pro-
cess,” does not authorize an exemption of fifteen dollars per ton on all ores so
worked in addition to the actual cost of working them, but only where such
actual cost exceeds sixty per cent. of the gross yield.

LEGISLATIVE INTENT OF ACT TO TAX NET PROCEEDS OF MINES. In the passage
of the act of February 28, 1871, for the taxation of the net proceeds of mines,
(Stats. 1871, 87) the legislative intent obviously was, first, to tax the gross yield
less the actual cost; and, second, to limit a maximum, beyond which not even
actual cost should be deducted: in other words, to exempt only the actual cost,
provided it did not exceed sixty per cent. of the gross yield in case of ores
worked by wet process, and sixty per cent., together with fifteen dollars per ton,
in case of ores worked by dry process.

OMISSION OF “DOLLAR MARK” IN TAX ASSESSMENT ROLL. In an action to
recover delinquent taxes on the net proceeds of mines, where plaintiff was
allowed to introduce in evidence the original assessment roll, notwithstanding
there was no dollar mark attached to the figures purporting to indicate the
amount of the tax due or assessed, and it was objected to on that ground: *Held*,
that the fair and reasonable presumption, in the absence of anything to show to
the contrary, was that the figures, disposed in perpendicular columns in the
form prescribed by statute, indicated dollars and cents, and that the admission
of the roll in evidence was not error.

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SUFFICIENCY OF DELINQUENT TAX ASSESSMENT ROLL. Where a delinquent assessment roll, objected to for want of the "dollar-mark," had such mark prefixed to all the columns except the last, headed "total amount of tax," which, however, was added up and the mark prefixed to the sum total: *Held*, that such roll furnished sufficient legal evidence to enable a court to determine with certainty the amount of the tax, and that in a suit for delinquency such roll was all the plaintiff need introduce to make out a *prima facie* case.

IRRELEVANT MATTER IN "STATEMENTS" OF PROCEEDS OF MINES. Matters inserted in a statement of the proceeds of a mine such as is required to be furnished by the mining tax law, (Stats. 1871, 87) the insertion of which is not authorized by the statute, go for nothing and the assessor is not bound to pay any regard to them.

OBJECT OF NOTICE BY ASSESSOR OF UNPAID TAXES ON MINES. The written notice required by section 7 of the mining tax law, (Stats. 1871, 87) to be given by the assessor to parties engaged in reducing ores, is not a prerequisite to liability of the producer for the tax, but only intended to hold a party reducing ores extracted by others to the extent of the value of the ores in his possession when notified.

TAXES ON PROCEEDS OF MINES TO BE COLLECTED QUARTERLY. There is nothing in the use of the word "manner" in section 10 of the mining tax law, (Stats. 1871, 87) which provides that the collection shall be enforced in the same manner as on other kinds of personal property, to prevent the collection of such taxes quarterly—the word "manner" as there used does not mean "time."

APPEAL from the District Court of the Sixth Judicial District, Lander County.

This was an action against the Eureka Consolidated Mining Company, and the possessory claims to the mines or mining claims, known as the "Eureka Consolidated Mines," in the Eureka Mining District, Lander County, brought to recover the taxes imposed on the net proceeds of such mines for the quarter ending March 31, 1871. The complaint sets forth that the gross yield of those mines for that period was \$107,262; that the deductions for costs allowed by law was \$64,357 20, being sixty per cent. of the gross yield, leaving \$42,904 80 as net proceeds subject to taxation; and demanding judgment for \$1244 24 as the tax on said net proceeds.

It appears from the statement furnished by the superintendent of the mines to the assessor, that the gross yield amounted to 2998 tons worked by dry or roasting process, of the gross value of \$107,262, and that the cost of mining, reducing, and transportation exceeded sixty per cent., but

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he did not say how much. He then claimed to deduct sixty per cent., amounting to \$64,357 20, and in addition thereto fifteen dollars per ton, amounting to \$44,970, making in all \$109,327 20, or in other words a sum exceeding the gross yield. The defendants adopted this view of the matter, and claimed that they were not liable to any tax whatsoever. Other facts are stated in the opinion.

There having been a judgment in the court below for the plaintiff as prayed, and a motion for new trial overruled, defendants appealed from the judgment and order.

H. Mayenbaum, for Appellants.

I. There is an absolute exemption of fifteen dollars per ton allowed on all ores worked by dry process; it is an additional and arbitrary exemption, without reference to cost allowed on all ores worked by dry process. The rule was adopted for the purpose of arriving at the value of the ore thus worked, and is no more arbitrary than the rule in the old law exempting forty dollars per ton on all ores worked by roasting process, and eighteen dollars per ton on ores worked by wet process. The legislature declares that an additional exemption of fifteen dollars per ton in dry process shall be allowed, and this it had the right to do, just the same as it had under the old law, whereby it allowed double the exemption for roasting process that it allowed for wet process. See *State v. Estabrook*, 3 Nev. 179; *Virginia City v. Chollar Potosi*, 2 Nev. 92.

II. The assessor was bound to assess the ores according to the written statement of the defendants' superintendent, and it is only in case of the refusal of a party to make such statement, that the assessor is authorized to assess from other sources. Besides, notice in writing was a prerequisite to the liability of the defendants for taxes; and as the general statute for the collection of taxes on the proceeds of mines must be followed, the collection cannot be made quarterly, but must be made annually in the same manner as taxes on other property is collected. Stats. 1871, 87, Secs. 4, 7, and 10.

III. The assessment roll, as well as the delinquent list, are radically defective in failing to indicate what is meant by the figures. 27 Cal. 50; 30 Cal. 610; 31 Cal. 132.

C. R. Greathouse, also for Appellants.

The question is whether the words "additional exemption of fifteen dollars per ton," mean in fact an exemption and that amount to be deducted from every ton worked by these processes in addition to the other specified deductions for extraction, etc., or whether the limit of sixty per centum on the gross value is simply extended, so that the specified deductions for extraction, etc., may (should they amount to so much) go beyond the sixty per centum to an extent not exceeding fifteen dollars per ton. The words "additional exemption of fifteen dollars" certainly imply that there are some other exemptions, and if we can discover what these are, the section is relieved from all ambiguity. See Webster's definitions of "exempt" and "exemption." With these definitions in view, it is clear that the sixty per centum is not an *exemption*; upon the contrary, it is a *limit* upon the exemptions made by the deductions for extraction, etc. If then this per centum is not an exemption, the fifteen dollars cannot with propriety be coupled with it as an "additional exemption," and it therefore follows that it is an exemption additional to those to be made for the extraction, transportation, and reduction, or sale of the ore.

The assessment should be made as follows: From the gross value of the ore deduct the actual cost of extraction, reduction, etc., or if this exceeds sixty per centum of the gross yield, only deduct this percentage; then from the remainder deduct the additional exemption of fifteen dollars for each ton and the remainder is subject to taxation.

A. M. Hillhouse and *N. D. Anderson*, District Attorney, for Respondent.

I. If the latter part of section 1, of the act of 1871, is valid for any purpose, it is only to allow an additional amount as cost of extraction and milling, etc., when such actual cost

exceeds the percentage first limited; and then only to such an extent as such actual expenses exceed such percentage. In this view, passing the question of the unconstitutionality of the portion of the section referred to, the first part of the law makes the levy, and then provides for the assessment; that is, on that ore which is worth certain sums, certain percentages are allowed, when the actual cost of extracting, etc., amounts to as much as the percentage. But it is plain that no certain per cent. is allowed, unless the actual cost of extracting, etc., amount to that much. The title of the act, as also the act itself, shows that the "net proceeds" are to be taxed. No arbitrary allowance is made. No exemption, but actual cost. Then, if we proceed to interpret the latter clause of section 1 in the same manner as the first portion, we find that it means that if ore is worked by dry or Freiburg process, and it costs by reason of such process more than the per cent. allowed, then such additional cost, not to exceed the fifteen dollar limit, may be allowed; that is, if it exceed the per cent. limited one dollar, or two dollars, or fifteen dollars, that may be allowed. This would render the law uniform, and give to those who work ores by the more expensive process the advantage of their full actual cost of extracting, etc.

II. A technical objection is made that the dollar marks do not appear in the assessment roll or delinquent list. While we admit that the California courts have at one time held to such a doctrine, we must be permitted to say that no such rule ever can or should be sustained, by reason or justice. The court that rendered that decision certainly forgot or overlooked the facts that from the levy we find the per cent. to be collected; from the statement the amount to be taxed; and that the tax is computed and shown in the list. Taking all together, how any one could say there was any uncertainty what the figures stand for, seems very much like presuming on the ignorance of courts and juries. But in this case all such questions are avoided; because the pleadings show clearly the value of property taxed, as also the tax on the same.

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III. We are also met with the objection that the assessment was erroneous because the assessor did not follow the statement furnished; and that no demand was proven. It appears however that the superintendent did furnish a statement from which the assessor made the assessment, only leaving out that which was improper. Again, it is said the company is not liable because no notice was served as required by section 7. That section is intended clearly only as a manner in which parties, who may have ore in their possession belonging to others, may be rendered liable for the tax on such ore. It simply provides how the State shall secure the tax when ores are in the possession of parties other than the owners—a sort of garnishment alone. Again, we are told that this tax cannot be collected, except when general taxes become delinquent. In answer, we submit that “manner” does not mean “time,” and that there is nothing in the suggestion.

L. A. Buckner, Attorney General, and *T. W. Healy*, also for Respondent.

The act of 1871 gives the form of the assessment roll in addition to prescribing clearly the facts to be stated in it. The act in relation to money of account and interest (Stats. 1861, 99) provides that the money of account of this State shall be the dollar, cent, and mill; but as section 3, in judgments, decrees, etc., rejects less than a cent, it follows that there can be but two columns; and the enumeration of figures being a matter of science, the court will take judicial notice of the fact that in money columns the enumeration is from the right to the left; that units and tens are cents; and hundreds, progressing in the same direction, are dollars. Hence in the books of account in the State treasurer's and controller's offices, there are no dollar marks. The same is true of the banks, etc. By examination of the ruled form in the second section it will be seen that all the columns save the first and second are columns of value; therefore, that by dividing these it is a neat and convenient way book-

keepers have of showing dollars and cents without defacing the book with as many dollar and cent marks as there are items. The objection proceeds on the assumption that the dollar mark can only be made thus (\$) but such is not the fact; on the contrary, the universal custom in the offices named, in banks, in commercial houses, etc., is to rule and keep their books by ruling dollar and cent columns.

In the California cases quoted the form of the assessment roll is given in the report of the case; and it will be observed there are no dollar or cent columns, and no dollar marks; hence it is amenable to the objection; but the cases are not in point, for the reason that the roll here is different.

Again, the delinquent list has the dollar mark to every column, but in the last line it is only placed before the sum total of the addition of the whole line. It is very evident that you can only make dollars and cents by the addition of dollars and cents; and the result shows conclusively that all the figures in these two columns are dollars and cents as they are respectively placed. A similar question was decided in *People vs. Empire G. & S. M. Co.*, 33 Cal. 171.

H. Mayenbaum, for Appellants, in reply.

If there is any necessity to show authorities sustaining the decision of California on this question of dollar mark it will be sufficient to cite the case of *Woods v. Freeman*, where the same question was similarly decided in the Supreme Court of the United States. 1 Wallace, 398; see also 20 Ill. 341; 21 Ill. 147.

It is however claimed that the question is avoided because the pleadings show the value of the ores. But it will be seen that the answer specifically denies each and every allegation in the complaint, and it was therefore necessary to introduce in evidence the delinquent list, and this list could not be used in evidence according to the decisions cited. The assessment roll and delinquent list are the foundation of the tax; and if these lists fail to show what the tax is they cannot be used in evidence in a suit against a citizen or taxpayer to enforce an imaginary tax or assessment.

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By the Court, GABBER, J. :

This action was instituted to recover the tax assessed on certain ores, under the provisions of the act entitled "An act providing for the taxation of the net proceeds of mines," approved February 28, 1871. The ores were extracted by the appellant during the quarter commencing January 1, 1871. The gross yield thereof was between thirty and one hundred dollars per ton, and (it will be assumed) they were worked by Freiburg, or dry process.

The appellant contended that the assessment should be made as follows : "From the gross yield of the ore, deduct the actual cost of extraction, reduction, etc.; or, if this exceeds sixty per centum of the gross yield, only deduct this percentage—then, from the remainder, deduct the additional exemption of fifteen dollars for each ton, and the remainder is subject to taxation." But the court decided that the maximum of deductions to be allowed is obtained by adding to sixty per centum of the gross yield fifteen dollars for each ton; and that subject to such maximum, the actual cost of extraction, etc., is to be deducted from the gross yield, the remainder being subject to taxation; consequently, as in this case the actual cost did not exceed sixty per cent. of the yield, no portion of the asserted exemption of fifteen dollars per ton was allowed. We are clearly of opinion that the decision was correct.

The section of the statute upon the construction of which the decision depends, so far as it applies to ores of this description, enacts that all ores shall be assessed as follows : From the gross yield, there shall be deducted the actual cost of extraction, transportation, and reduction or sale; and the remainder shall be deemed the net proceeds, and shall be assessed and taxed; *provided*, that in no case whatsoever shall the whole amount of deductions allowed to be made in this section from the gross yield exceed sixty per centum of such gross yield; *provided*, that an additional exemption of fifteen dollars per ton may be allowed on all ores worked by Freiburg or dry process.

The intention of the legislature, the thought which this section expresses, is obvious. First, to tax the gross yield, less the actual cost; and, second, to limit a maximum, beyond which not even actual cost should be deducted. The grade of the ore and the nature of the process are material only as a means of arriving at what are to be deemed the net proceeds, to tax which is the avowed object. So, in fixing the limit of deductions, so as to approximate as near as might be the actual cost, these considerations became important; and, consequently, this limit was arranged on a sliding scale, varying with the grade of the ores and the nature of the process. It was so arranged because, and only because, experience had shown that the cost of reduction usually varies according to the same conditions. There is no more propriety in allowing the fifteen dollars per ton to be deducted, without regard to the actual cost, than in allowing the sixty per cent. to be so deducted.

It is argued for the appellants, that: "The question is whether the last proviso means in fact an exemption. The words, *additional exemption* of fifteen dollars, certainly imply that there are some other exemptions; and, if we can discover these, the section is free from ambiguity. With Webster's definitions of "exempt" and "exemptions" in view, it is clear that the sixty per centum is not an exemption, but is a limit upon the exemptions made by the deductions for extraction, etc.—not being an exemption, the fifteen dollars cannot, with propriety, be coupled with it as an *additional exemption*; and it follows, therefore, that the fifteen dollars is an exemption *additional* to those allowed to be made for the extraction, transportation, and reduction or sale of the ores." This is ingenious, but, we think, too partial and refined. According to Webster, "to deduct" may mean the same thing as "to exempt"; and whatever is deducted under the provisions of the statute, is *ipso facto* exempted or freed from the burden of taxation.

The enacting clause of the section is, that from the gross yield there shall be deducted the actual cost. This is the leading idea of the statute—the general rule proposed. The

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office of a proviso is to except something from the enacting clause, or to qualify or restrain its generality. *Per* Story, J., 15 Pet. 445. The last clause or proviso cannot be read as if it were a substantive and distinct enactment. The statute is as if it read: "From the gross yield the actual cost *shall* be deducted, subject however to the two following qualifications and exceptions, *viz*: such deduction shall not exceed sixty per centum of such yield, unless the ore is worked by dry process, in which case, an additional deduction of fifteen dollars per ton *may* be made." The proviso does not abrogate the rule adopted by the enacting clause, but merely qualifies the generality of that rule, which otherwise would have allowed the deduction of the cost without regard to its amount. Whatever is deducted over and above the sixty per centum, is surely a deduction additional to that allowed to be made on ores worked by wet process. It is an additional exemption—an exemption of another portion of the actual cost.

The actual cost *must* be deducted, except as the statute otherwise expressly directs. By adding the sixty per centum to the fifteen dollars per ton; or, by adding to the amount allowed for wet process, the additional amount allowed for dry process, we get the amount which *may* be allowed on ores worked by the latter. Below this limit, there is nothing in the statute forbidding the deduction of actual cost. Above it, the deduction of even actual cost is expressly prohibited. While the sixty per centum is, in one sense, a limit upon the exemptions allowed in all cases where the excepted process is not used, so equally is the fifteen dollars per ton a limit upon the additional exemption allowed in that specified case. In another sense, the sixty per centum may as well be termed an exemption of sixty per centum, as the fifteen dollars per ton, an exemption of fifteen dollars per ton. For wet process is allowed an exemption of sixty per centum; for dry, an additional exemption of fifteen dollars per ton—the exemption consisting of actual cost in the one case, as well as in the other.

On the trial, the plaintiff offered as evidence portions of the original and delinquent quarterly assessment rolls. The defendant objected to their introduction on the ground, "that there are no dollar marks placed to the figures and numbers purporting to indicate the amount of the tax due or assessed, or to any figures or numbers therein, and that it has no other marks indicating what is meant by those figures or numbers." The evidence was received and an exception taken. In support of this exception several authorities are cited. In *Lawrence v. Fast*, 20 Ill. 338, a judgment for taxes was offered in ejectment. It was rejected on the ground that it did not show the amount of tax for which it was rendered—that the use of the numerals without some mark, indicating for what they stand, is insufficient. The court said there was no mark, sign, or abbreviation in any way connected with the figures showing for what they stood. The figures were 2 48, written in a column headed "total." Breese, J., dissented, saying: "The form pursued by the collector is precisely the form given by the statute, and so is the entry of the judgment. It is certain to every ordinary intent that the figures in the proper columns indicated cents or dollars and cents. The most common man would so understand them, and would not be misled by them. The figures '2 48' must, of necessity, mean two dollars and forty-eight cents, or two hundred and forty-eight cents, which is the same. Mills are never expressed in that way. Courts of justice must draw the same conclusions from the same facts which the mass of the community would draw from them. Taking the columns with their headings and the figures in them as they stand, can any reasonable man doubt that dollars and cents or cents only were intended? I think not. It is not certainty to every intent in particular that is required in such proceedings, but common certainty." In 31 Cal. 132, the rule established in 20 Ill. was followed and applied to a case where the assessment roll was offered to sustain a suit for taxes. There, in a column headed "valuation," was written "101,937 18." The court

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say: "It is necessary that there should have been a tax assessed, and that the amount be ascertained, otherwise there is no basis for a judgment to rest upon; that if the assessment is so defective that the court cannot determine what is intended, it is insufficient as evidence to authorize a judgment: that a 'valid assessment' is the foundation of all subsequent proceedings." The same has been held in other California cases, all resting avowedly on the authority of the case in 20 Ill., and cases in 21 and 23 Ill. to the same effect. *Woods v. Freeman*, 1 Wallace, 398, also holds that a judgment for taxes similar to that rejected in 20 Ill. cannot be introduced in ejectment. The decision is expressly placed upon the ground, that the validity of the judgment depended upon the construction of an Illinois statute, and that, therefore, the interpretation already given to the statute by the highest judicial tribunal in that State must be followed.

By another statute of Illinois, one holding a colorable title to land might perfect it by continuing in possession for seven years, and also, during that period, paying "all taxes *legally assessed* on that land."

In *Chickering v. Faile*, 38 Ill. 342, one of the parties claimed title by such a payment. It was objected that the taxes so paid, had not been legally assessed, because there was no word or character, annexed to the valuation, to indicate the sum in dollars and cents. The question presented was, therefore, whether such is a *legal or valid assessment*. The court say, referring to their earlier decisions above cited: "In a proceeding to divest title by summary action, it has been held that such a defect in the judgment for the taxes rendered the sale void. But this is a different question. We are not prepared to hold that such an assessment is void, as, if it is, all the acts performed under the assessment would render the officers wrong-doers, and subject them to an action for taxes collected on the assessment, and the collector a trespasser for distraining property for the collection of such taxes. We do not regard this omission as rendering the assessment illegal, nor the tax extended

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upon it, although there may have been nothing but the numerals to indicate its amount. We are not disposed to apply the want of a word or character to the numerals, to indicate the sum of taxes due, as a defect to anything prior to the application of the collector for a judgment against delinquent lands, and would not even apply it to the judgment, were it not that the judgment must find the sum for which it was rendered. To all of the proceedings prior to the judgment for taxes, all persons know what the numerals represent, the amounts, and act upon them accordingly. And persons might so understand in a judgment; but we understand the law to be inflexible, that the judgment must, in terms, find the sum due."

Elston v. Kennicott, 46 Ill. 202, presented the same question, and it was again affirmed that the want of the dollar mark is no defect to any matter or thing prior to the application for judgment. In this case, the taxes were paid for six of the seven years, and the excuse for the failure to pay the assessment levied during the remaining year was, that the taxes for that year were not legally assessed—the roll not containing the dollar mark.

We have set forth all the authorities bearing on this question, to which our attention has been called, because there is much in them which goes far to justify the confidence with which counsel has pressed this assignment. Upon principle, we think, the opinion of Judge Breese presents the more reasonable and common sense view of the question, especially as applied to the facts of this case. In the rolls admitted in evidence, the columns headed, "gross yield," "actual cost of extracting," etc., "total cost," "amount deducted," etc., "net yield," etc., and "total amount of tax," are each divided into two unequal spaces by ruled lines; the smaller space, on the right, being of the size to admit two figures, and containing throughout the roll only two figures on each line, while the larger space contains from one figure up to six, being evidently so ruled as to admit any number of figures likely to be called for to express the number of dollars in the largest assessments. By our statute (1861, p. 99)

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it is enacted that the money of account shall be the dollar, cent, and mill, and that all accounts in the public offices, and other public accounts, shall be kept accordingly, and that no proceeding shall be considered erroneous because the amount is computed in dollars and cents, omitting the mills. The form of the assessment roll, given in section 2 of the statute in question, also shows that it was contemplated that the amounts should be computed in dollars and cents only.

As matter of experience and habit, we also know that mills are usually disregarded in all these proceedings. The fair and reasonable presumption, in the absence of anything in such a roll as this to show the contrary, is that the figures in the smaller subdivision of the columns indicate cents, and those in the larger, dollars. The addition of the dollar mark would not make this more apparent. A sum of money, of course, is taken to be intended. By the statute of 1861 this can only be dollars, cents, and mills. The subdivision of the columns and the manner in which they are filled up unmistakably point to the rejection of one of these three denominations. Mills alone can be so rejected without rendering the proceeding erroneous. It was perfectly proper and legal for the assessor to omit these, and he is presumed to have done his duty.

Upon authority, it cannot be claimed that either doctrine has become settled law by the rule of *stare decisis*; or that, against our sense of right, we are bound to follow these recent and not altogether consistent or harmonious adjudications of two of our sister states—and, perhaps, the most that can be claimed is a conflict. The cases cited all purport to follow the Illinois ruling, and according to that, as explained in the later adjudications, it was proper, in making up the delinquent list, for the officer to assume that the numerals on the original roll represented dollars and cents, and to act upon them accordingly, by so designating them in the former. The delinquent roll is sufficiently explicit in this respect, according to all the authorities. See 33 Cal. 171. The dollar mark is prefixed to all the money columns, except the last headed "total amount of tax," and even that

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is footed up and the mark prefixed to the sum total. The delinquent roll, by the express terms of our statute, was all the plaintiff need have introduced to make out a *prima facie* case. The introduction of the original roll, though unnecessary, did not, under the Illinois doctrine, destroy this case, for it proved a *valid assessment*, and so went to sustain the delinquent roll which furnished sufficient legal evidence to enable the court to determine with certainty the amount for which judgment should be rendered.

There is nothing in the point that the assessor was bound to assess the ores in conformity with the statement furnished him by the superintendent of the defendant. The only deductions entitled to a place in the statement were, by the express wording of section 2, those relating to actual cost. Matters inserted in the statement, the insertion whereof is not authorized by the statute, go for nothing. Besides, the deduction of fifteen dollars per ton made in the statement, only amounts to the superintendent's construction of the statute, and his assertion of a corresponding claim to exemption. If this is to govern, much time has been wasted in construing the statute.

The notice in writing, required by section 7, is not a prerequisite to the liability of the defendant to the tax. Such notice is only necessary to hold a party reducing ores, extracted by others, to the extent of the value of the ores in his possession when notified. Equally untenable is the position that the tax cannot be collected quarterly. As counsel say, the word "manner," in section 10, does not mean "time."

We do not see how the record can be construed as showing that the cost of extracting, transporting, and reducing the ores exceeded sixty per cent. of the gross yield, or that the appellants made any such claim. The answer expressly admits and avers that said cost was sixty per cent. of such yield; and, though the statement of the superintendent gave the cost as *exceeding* the sixty per cent., there is no showing anywhere how much the excess was, and, of course, no claim could have been based thereon.

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The judgment and order appealed from are affirmed.

By WHITMAN, J., specially concurring :

As I read the record in this case, the cost of extracting, transporting, and reducing the ores of appellants exceeded sixty per cent. of the gross yield ; so they claimed a further deduction, or, in the words of the statute, "additional exemption," of fifteen dollars per ton, because the working was by dry process. This claim was disallowed by the district judge, as I understand the decision, upon the ground that no allowance could legally be made beyond sixty per cent. of the gross yield ; holding the percentage specified in the statute to be in this case, as in every other, the maximum of deductions. This view I believe to be correct; and so concur in the judgment.

J. L. CARNAGHAN *et al.*, RESPONDENTS, *v.* B. F. WARD
et al., APPELLANTS.

SEPARATION OF JURY—WHEN NOT PREJUDICIAL. Where a juror, after retiring to deliberate upon a verdict, found it necessary to leave the jury-room for a few moments, and did so, simply going to the rear of the court-house and returning immediately; and it appeared affirmatively that during such separation he had no intercourse or conversation with any one respecting the trial: *Held*, no ground for disturbing the verdict.

CONVERSATION OF ATTORNEY WITH JUROR—WHEN NOT PREJUDICIAL. Where an attorney of the prevailing party saw one of the jurors, after retirement, leave the jury-room for a few moments, and supposing that a verdict had been agreed upon, inadvertently asked him if such were the case, and was answered in the negative: *Held*, that such conversation could not have prejudiced the other side, and would not authorize a setting aside of the verdict.

ATTORNEY SENDING FOR MEDICINE FOR JUROR. Where a juror, after retirement, being for a few moments outside of the jury-room, asked an attorney of the prevailing party to send some one for a bottle of liniment which was prepared for him at a drug store, and which he wished to use as he was lame and suffering pain; and the attorney replied he would do so, and the liniment was afterwards passed in to the juror by the officer in charge: *Held*, that the compliance with the juror's request was not such an act as would vitiate the verdict.

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DIFFERENCE BETWEEN "TREATING" A JUROR AND PERFORMING A MERE ACT OF HUMANITY. There is a marked distinction between the performance of a mere act of humanity or duty for a juror, such as sending at his request for liniment to relieve his pain, and the voluntary offer of civilities, such as the treating with spirituous liquors, passed on in *Sacramento and Meredith M. Co. v. Showers*, 6 Nev. 291, which neither duty, charity, nor the conventionalities of society require.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

This was an action by J. L. Carnaghan, S. F. Fisher, H. McClintock, and J. M. Crawford against B. F. Ward and the Silver Star Consolidated Silver Mining Company to recover possession of a mining claim, known as the "Wabash Lode," on or near Pogonip Flat, White Pine County, for \$5000 damages, and for an injunction restraining defendants from extracting or removing ore therefrom. Defendants denied all the allegations of the complaint and set up ownership in the Silver Star Consolidated Mining Company, and that Ward was the managing agent thereof. The cause was tried before a jury and resulted in a verdict for plaintiffs; and in accordance therewith a judgment was entered in their favor for possession of the lode described and costs.

The defendants moved for a new trial, relying mainly upon alleged misconduct of the jury in the particulars stated in the opinion, and that there was no evidence to sustain the verdict against Ward. The court below held that the evidence as to Ward was not sufficient, but that the points as to misconduct of the jury were not well taken, and ordered the motion overruled, provided the plaintiff would dismiss the action as to the defendant Ward, which they accordingly did. The Silver Star Consolidated Silver Mining Company appealed from the judgment and order.

C. H. Bellnap, for Appellants.

Such a separation of the jury as took place is not permissible, is contrary to the statute, and should avoid the verdict. The rule in *Sacramento and Meredith M. Co. v. Showers*, 6 Nev. 291, is not founded upon a pecuniary benefit, but its reason is that any act done to a juror by the

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prevailing party, his attorneys, or agents, which may induce favor, or affection, or gratitude, will avoid the verdict. The act of Mr. Wren, the attorney of the prevailing party, was such an act, and avoids the verdict.

Thomas Wren and F. W. Cole, for Respondents.

A separation of the jury, whether before or after the final submission of the case, is no ground for setting aside the verdict, unless it can be shown that by reason of such separation some injury was done to the party against whom the verdict was rendered. In other words, the mere separation will not vitiate a verdict unless the party's rights were prejudiced thereby. 1 Cowen, 221, and cases cited in note; 2 Waterman on New Trials, 531. In some of the cases above referred to, it is held that a jury may separate after retiring, in case of necessity. In one case, there was a tempest which drove the jury out of their room; in another, there was a riot which the jury assisted in quelling; whilst, in another, one of the jurymen was sick. We deem it unnecessary to discuss the point as to Mr. Wren's sending after a bottle of liniment.

C. H. Belknap, for Appellants, in reply.

The authorities cited by respondents as to separation of juries are generally upon the common law rule, and none of them upon a statute at all similar to ours. Our statute providing when the jury shall be kept together (Stats. 1869, 222, Sec. 168) implies that no separation shall take place after the submission of the case to the jury. If one officer is unable to keep them together, the statute provides for more; and whenever it becomes necessary for a juror to absent himself from his fellows he should be accompanied by an officer. The rights of litigants and the purity of jury trials require this protection.

As to the act of Mr. Wren in procuring for the juror a bottle of liniment: The rule in all the adjudged cases is, that whenever an act has been done to a juror by the prevailing party, his attorneys, or agents, that is calculated to

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excite favor, affection, or gratitude, the verdict will be set aside. It matters not what the act was, nor the circumstances that prompted it; if any thing was done that might have created gratitude, the verdict must be set aside. The reason of the rule is stated to be to prevent the jury from finding a verdict against their unbiased sense of the right of the case by motives of gratitude or feelings for favors however slight. 12 Pick. 519; 4 Washington, 34; 34 Georgia, 381; 4 Harrison, 80; 6 Nevada, 291; *Com. v. McCaul*, Virginia cases, 271; *Lester v. Stanley*, 3 Day, 287.

By the Court, LEWIS, C. J.:

The appellants endeavor, first, to maintain that there was an illegal separation of the jury in this case which entitles them to have the verdict vacated. The facts upon which this assignment of error rests are, that after the jury had retired to deliberate upon the verdict, one of the jurors found it absolutely necessary to leave the jury-room for a few moments, and did so, simply going to the rear of the courthouse however, and returning immediately. If it be admitted that the showing made by the affidavits of the appellants would, unexplained or unanswered, constitute such separation as would justify the court in setting aside the verdict, it certainly could not be so considered where, as in this case, the respondents show that during the separation complained of the juror had no intercourse or conversation with any one respecting the trial. It is a familiar rule of practice, with perhaps some exceptions, that an irregularity which is shown could not have prejudiced the losing party, will not justify an interference with the verdict. When, therefore, it is shown, as it was in this case by the respondents, that there was nothing connected with the separation which could in the least prejudice the appellants, there is no ground for disturbing the verdict and judgment. Such is the rule very generally followed by the courts. See cases cited in 2 Graham and Waterman on New Trials, 534, *et seq.*

One of the attorneys for the respondents, seeing the juror

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leave the court-house, supposed that a verdict had been agreed upon, and inquired of the juror if such were the case, and was answered in the negative. The respondents show that not another word passed between the parties at this time, and that this conversation took place in the presence of two disinterested witnesses, and was clearly inadvertent. The second point relied on is, that this was error; it was evidently not. This could not be said to be a conversation concerning the case, and it was beyond the range of possibility that it could have prejudiced the appellants, and, therefore, will not authorize a setting aside of the verdict.

It appears that when the juror was returning to the jury-room, again seeing the attorney whom he had seen upon going out, he requested him to send some person for a bottle of liniment which was prepared for him at a certain drug store in the town, and which he wished to use, as he was quite lame and suffering much pain. The attorney replied that he would do so, and nothing further passed between them. The liniment was sent for and passed to the juror by the officer in charge. This, it is argued, is such an extension of favor to the juror by the attorney of the prevailing party, as to vitiate the verdict under the rule announced in the case of *The Sacramento and Meredith Mining Company v. Showers*, 6 Nev. 291.

It was held in that case, that the treating of the jury by the prevailing party with spirituous liquor would vitiate the verdict. The act in that case was volunteered, and was entirely uncalled for by any rule of civility or propriety. The law, as there laid down, is sustained by a very strong current of decisions, and is recommended by the strongest considerations of policy and prudence. But there is nothing in that case which even intimates that the parties to a suit must disregard the simple dictates of humanity, or refuse to discharge the commonest duties imposed upon them by the laws of God and morality alike. To refuse to perform so slight an act to relieve the sufferings of a juror would be a clear disregard of the plainest duty, which no circumstances can justify, and which the law does not demand. There is

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a marked distinction between the performance of a mere act of humanity or duty for a juror, as in this case, and the voluntary offer of civilities which neither duty, charity, nor the conventionalities of society require of a man. And this is the distinction between the case of the *Sacramento Company v. Showers* and the case at bar. The compliance with the request of the juror was not such act as should vitiate the verdict.

The judgment must be affirmed. It is so ordered.

GARBER, J., having been of counsel in the court below, did not sit in this case.

GEORGE H. ROGERS, AS ADMINISTRATOR ETC., RESPONDENT, v. A. J. HATCH, APPELLANT.

CAPACITY OF FOREIGN ADMINISTRATOR TO SUE ON JUDGMENT. An objection of want of capacity to sue on the ground that the plaintiff is a foreign administrator without grant of letters in this State cannot be sustained when the action is on a judgment previously obtained by him in his own state—the suit being in reality a personal one.

PRESUMPTION AS TO LAWS OF OTHER STATES. In the absence of proof of the laws of another state they will be presumed to be the same as in this State.

SUIT ON CALIFORNIA JUDGMENT PENDING APPEAL. Where an administrator recovered a money judgment in a California district court, and it was appealed to the supreme court of that state, but no undertaking on appeal sufficient to stay execution was filed: *Held*, that there was nothing in the fact and pendency of such appeal to prevent the maintenance by such administrator of a suit on the judgment in this State.

ACTION ON JUDGMENT PENDING APPEAL NOT OPERATIVE AS STAY. In an appeal from a money judgment in a district court, where the only undertaking on appeal is for costs, there is no such vacation or suspension of the judgment as to prevent its being sued on in a foreign state during the pendency of such appeal.

SHERMAN v. DILLEY, 3 NEV. 21, CRITICIZED. The opinion expressed in *Sherman v. Dilley*, 3 Nev. 21, that a judgment cannot be pleaded in bar or operate by way of estoppel while the case is pending on appeal, is rather dictum than decision.

APPEAL from the District Court of the Second Judicial District, Washoe County.

Rogers v. Hatch.

This was an action by George H. Rogers, as administrator of the estate of James A. Rogers, deceased, upon a judgment for \$1193 55, recovered by him as such administrator against the defendant on April 14, 1871, in the district court of the fourth judicial district of the State of California, in and for the City and County of San Francisco. He set forth in his complaint the death of the intestate at San Francisco on September 28, 1868; the jurisdiction of the San Francisco probate court over the administration of the estate; his appointment as administrator, and the issuance of letters to him on his qualification; the commencement of a suit by him as such administrator against defendant in said fourth district court; the personal service in San Francisco of summons therein on defendant and the recovery of judgment as above stated; and he proceeded to allege that such judgment was in full force and effect, unsatisfied, unreversed, and unannulled; that defendant was a resident of Washoe County and not within the jurisdiction of the court in which the judgment was rendered; that defendant thereby became and was indebted to plaintiff in the amount of said judgment, and demanding judgment therefor.

Defendant demurred on the ground that the complaint did not state facts sufficient to show that the action in which judgment was rendered was not still pending on motion for new trial or appeal, or that the time for such motion or appeal had expired. The demurrer was overruled; and defendant then answered, setting up, among other things, that the judgment sued on was not in force, but was suspended by an appeal to the supreme court of California, taken and duly perfected by the defendant, and that there was consequently a former action pending for the same cause of action. Defendant also filed written objections to the trial of the action on the ground that plaintiff could not sue in his capacity of administrator, appointed by the probate court in California, and that he did not sue as administrator by virtue of any appointment under any law of the State of Nevada; all of which objections were overruled.

The cause was tried by the court below without a jury.

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The judgment in California having been duly put in evidence by plaintiff, the defendant offered a transcript of the same action on appeal in the supreme court of California, to which plaintiff objected as irrelevant and immaterial, on the ground that it appeared on the face thereof that the undertaking on appeal was a mere bond for costs, being for a sum not exceeding three hundred dollars; and that not being in double the amount of the judgment and costs it did not stay the execution of such judgment. The objections were sustained, and the transcript on appeal excluded. The court found in favor of the plaintiff for the amount claimed by him with interest; and, a motion for new trial having been denied, defendant appealed from the judgment and order.

Thomas E. Haydon, for Appellant.

I. A foreign administrator cannot maintain a suit in the courts of this State without taking out letters of administration in this State. Story's Conflict of Laws, Secs. 512, 513, and note.

II. There was error in refusing to allow defendant to prove the pendency of his appeal on the original judgment, in order to show that any right of action thereon was barred during such appeal. See *Sherman v. Dilley*, 3 Nev. 27; *Campbell v. Howard*, 5 Mass. 378; *Atkins v. Wyman*, 45 Maine, 400; *Dubois v. Dubois*, 6 Cowan, 495; *Post v. Neafie*, 3 Caines, 28; *Gale v. Butler*, 35 Ver. 449; *Byrne v. Prather*, 14 Lou. 653; *Thornton v. Mahoney*, 24 Cal. 583; *Penhallow v. Doane*, 3 Dallas, 87; *Keen v. Turner*, 13 Mass. 265; *Paine v. Corwin*, 20 Pick. 510; *Robbins v. Appleby*, 2 N. H. 223; *Tarbox v. Fisher*, 50 Maine, 236; *Stillbird v. Beattie*, 36 N. H. 455; *Stone v. Spillman*, 16 Texas, 432. An appeal suspends the judgment for evidence, as a bar or as an estoppel. *People v. Frisbie*, 26 Cal. 135; *McGarrahan v. Maxwell*, 28 Cal. 75; *Bryan v. Berry*, 8 Cal. 135; *Knowles v. Tucker*, 12 Cal. 212; *Woodbury v. Bowman*, 13 Cal. 634. The pendency of an appeal can be pleaded in bar of an action on the original judgment; i. e., that there are two actions pending for the one cause.

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I. B. Marshall, for Respondent.

I. A foreign administrator can maintain a personal suit against the debtor in any other state, on a judgment that he has recovered. Story's Conflict of Laws, 889, Sec. 522; *Talmadge, Administrator, etc., v. Chapel et al.*, 16 Mass. 69.

II. An action on a judgment of a court of competent jurisdiction in another state may be maintained, notwithstanding an appeal from such judgment has been taken and is still pending in the court of such state. *Taylor v. Shew*, 39 Cal. 536. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Act of Congress of May 26, 1790; *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheaton, 234. Perfecting an appeal in California by the steps taken by the defendant in this case, does not suspend the operation of the judgment, nor stay its execution in the court where rendered. California Practice Act, Secs. 349 and 353.

By the Court, WHITMAN, J.:

Appellant first objects to the capacity of respondent to sue, he being a foreign administrator without grant of letters in and for this State. The objection fails in this case, as he sues on a judgment previously obtained, and the suit is in reality one personal. As was said in a like case upon a similar objection: "Here the action is on a judgment already recovered by the plaintiff, and it might have been brought by him in his own name, and not as administrator; for the debt was due to him, he being answerable for it to the estate of the intestate; and it ought to be considered as so brought, his style of administrator being simply descriptive, and not being essential to his right to recover. It is important to the purposes of justice that it should be so, for an administrator appointed here could not maintain an action upon this judgment, not being privy to it. Nor could he maintain an action upon the original contract; for the defendants might plead in bar the judgment recovered against them in New

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York. The debt sued for is, in truth, due to the plaintiff in his personal capacity; for he makes himself accountable for it by bringing his action, and he may well declare that the debt is due to himself." *Talmadje, Admr. v. Chapel et al.*, 16 Mass. 71. See, also, Story's Conflict of Laws, Sec. 522.

The only other error assigned is the refusal of the district court to admit the record offered to prove the pendency of an appeal to the supreme court in California from the judgment here in suit rendered in one of its district courts. The paper showed on its face that the only bond given upon such appeal was for costs. There is no proof here of the laws of California in such case, so it must be presumed that, as in this State: "If the appeal be from a judgment or order directing the payment of money it shall not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant. * * *" Stats. 1869, Sec. 342. And in that view this case will be considered, which at once reduces the question to the simple proposition, whether a bare appeal from the district court to the supreme court, under the statute, vacates the judgment, or so suspends its vitality that it cannot be sued on in a foreign country during the pendency of such appeal.

No doubt many cases can be found which, in general terms, support the affirmative of this issue, but upon examination they will in most instances be seen to be founded upon statutes different from that of this State, and which make an appeal an entirely different matter in its effect; or else that the language used is rather dictum than decision, as in *Sherman v. Dilley*, 3 Nev. 21. The rule is very well stated thus: "The plaintiffs finally claim that the judgment in New York is set aside or suspended by the appeal from it to the court of appeals of that state, and that it therefore constitutes no defense in this suit. The effect of that appeal depends upon the character of the jurisdiction of that court. If, by the laws of New York, a case carried before it by appeal is to be retried by it as upon original process in that court, and it has jurisdiction to settle the controversy by a judgment of its own, and to enforce that judgment by its

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own process, the appeal, like an appeal under our statutes from a justice of the peace to the superior court, would vacate the judgment of the inferior tribunal. *Curtis v. Beardsley*, 15 Conn. 518; *Campbell v. Howard*, 5 Mass. 376. But if the appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors which may have intervened on the trial of the case below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and that court has no other powers or duties than to affirm, reverse, or modify that judgment, or remit the case to the inferior tribunal that it may conform its judgment to that of the appellate tribunal, then such appeal, like an appeal under our laws, from the probate court to the superior court, does not vacate or suspend the judgment appealed from; and the removal of the case to the appellate court would no more bar an action upon the judgment than the pendency of a writ of error at common law, when that was the proper mode of correcting errors which may have occurred in the inferior tribunal. That such an action would not be barred by the pendency of such a proceeding is well settled. The judgment below is only voidable and stands good until set aside. *Case v. Case*, Kirby, 284; *Sloan's Appeal from Probate*, 1 Root, 151; *Curtis v. Beardsley*, 15 Conn. 523. By a reference to the laws of New York, and the decisions of that state, to which we have been referred, it clearly appears that the appeal now in question did not carry up the matter in controversy, in the case in which it was taken, to be retried in the court of appeals, as upon original process, but only presented the case to that tribunal for its revision, and that it had no jurisdiction except to affirm, reverse, or modify the judgment appealed from, and remit the case to the inferior tribunal. It was accordingly held, and in our opinion correctly, by Judge Nelson, in the United States Circuit Court for this district, at its September term, 1854, in *Seeley v. Pritchard*, that, under the laws and practice of the state of New York, a judgment was not impaired by an appeal, but that an action

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of debt was sustainable thereon while the appeal was pending." *Bank of North America v. Wheeler*, 28 Conn. 423. See, also, *Suydam v. Hoyt*, 1 Dutcher N. J. 231; *Burton v. Reeds*, 20 Ind. 87; *Nile v. Compant*, 16 Ind. 107.

The Supreme Court of this State under our statute, presumably that of California under its, stands on the same plane with the New York court of appeals as described in the citation; and consequently it follows, that the appeal to the supreme court of California did not impair the effect of the judgment; and that so far as that point is concerned, the present action could be properly maintained thereon. The evidence offered then would have been, as objected, immaterial; it could not have served to prove any matter directly or indirectly defensive; so it was properly rejected.

The judgment and order appealed from are affirmed.

GARBER, J., did not participate in the foregoing decision.

ANDREW BLACKIE *et al.*, RESPONDENTS, *v.* MICHAEL COONEY, APPELLANT.

INSUFFICIENT DENIAL.—“DE MINIBUS.” Where a complaint in replevin alleged the value of the property taken on June 22, 1870, to be five hundred and seventy dollars, and the answer denied “that the property in the complaint described is or was, on said June 22, 1870, of the value of five hundred and seventy dollars”; and the court, without any testimony on the subject, found the value as alleged: *Held*, that the pleadings justified a finding of any sum less than five hundred and seventy dollars, and that, if by finding that exact amount, any error occurred, it was of that infinitesimal character which could do no injury.

INTEREST AS DAMAGES IN REPLEVIN CASES. In actions to recover personal property wrongly taken, interest from the time of taking may always be given as damages, without proof of special damage.

EFFECT OF STIPULATION TO TAKE DEPOSITION AS ADMISSION. Where it was stipulated that certain depositions “may be taken before L. P. Fisher, a justice of the peace at Woodstock, in the county of Carleton, in the province of New Brunswick”: *Held*, that the stipulation was a concession that there was a person named L. P. Fisher, occupying the official position of justice of the peace at the place mentioned, and was an agreement, under the statute, upon that person to take the deposition.

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DEPOSITIONS—CERTIFICATE OF COMMISSIONER TO HIS OWN OFFICIAL CHARACTER. As the statute in reference to depositions out of the State, (Practice Act, Secs. 412, 414) provides no method of identification of the official character of the person appointed to take them, such person, whether judge, justice of the peace, or commissioner, becomes for the purpose the officer of the court issuing the commission; and his certificate of his own character must be deemed to show *prima facie* that he is the person designated.

CERTIFICATE TO DEPOSITION TAKEN OUT OF THE STATE, WHAT TO CONTAIN. Where it was objected to a deposition taken out of the State that the statement, that the deposition was read over to the witness before signing, was interlined in the certificate and in a different ink from the body of it: *Held*, that the interlineations were of nothing material, as the statute did not prescribe any form of certificate nor require any matter to be specifically set forth, except that the commissioner had administered an oath and taken the deposition in answer to the interrogatories, or, when the examination was without interrogatories, in respect to the question in dispute.

NO ERROR IN EXCLUDING IMMATERIAL EVIDENCE. In an action of replevin, where defendant justified under a writ of attachment and execution, and it appeared that the attachment and judgment were admitted but that the suit constituted no justification: *Held*, that the execution was immaterial and its exclusion on any other ground was not error.

OBJECTION OF INSUFFICIENT EVIDENCE. An objection that the evidence is insufficient to warrant a judgment, cannot be maintained where there is substantial testimony for its support.

APPEAL from the District Court of the Second Judicial District, Washoe County.

This was an action of replevin by Andrew Blackie, David Hemphill, and John G. Hemphill for seven head of oxen, alleged to be worth five hundred and seventy dollars, taken by defendant out of the possession of plaintiffs. Defendant was the acting constable of Washoe Township, Washoe County, and justified the taking under a writ of attachment issued by the justice of the peace of said township in a suit wherein Robert Hamilton was plaintiff and John Brown defendant, and as the property of said Brown. He also set up in defense that just previous to the attachment Brown had transferred and delivered possession of the oxen to the plaintiffs in fraud of his creditors; that Brown continued to be the real owner thereof, and that they were properly taken on the attachment and afterwards levied upon and sold under an execution subsequently duly issued in said case of *Hamilton v. Brown*.

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The cause was tried before the court below and resulted in a judgment for the plaintiffs, for the possession of the seven head of oxen and seventy-three dollars and sixty-two cents damages for the taking and detention thereof; and, if the oxen could not be returned, then for five hundred and seventy dollars, the value thereof, and seventy-three dollars and sixty-two cents damages and costs. The defendant moved for a new trial and assigned as errors of law occurring at the trial:

1. The admission of the depositions of the plaintiffs, Andrew Blackie and David Hemphill, against the objections of defendant.

2. The ruling out of the execution in the case of *Hamilton v. Brown*, offered in evidence by defendant and objected to by plaintiffs on the ground that it left blank the name of the party against whose property it was issued.

3. In finding that the property was of the value of five hundred and seventy dollars and in finding damages; no proof of any value or of any damages having been offered.

The motion for new trial was overruled, and defendant appealed from the judgment and order.

Webster & Knox, for Appellant.

I. The genuineness of the signature of the person named in the commission and agreed upon to take the depositions is not properly authenticated or proved. It is not shown that he was a justice of the peace at the time the depositions purport to have been taken. Both facts should appear upon the depositions or have been proved *aliunde*, as both were necessary to fulfill the terms of the agreement for taking the depositions. There was no waiver of such proofs in the stipulation. *Shepherd v. Thompson*, 4 N. H. 215; *Dunlap v. Wald*, 6 N. H. 450; 14 La. 795; 2 Scam. 348; 3 Nevada, 280. Neither in the caption nor in the certificates attached does the person signing describe himself as a justice of the peace. The mere adding to the signature the words, "A justice of the peace," etc., does not supply the omission.

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See Stats. 1869, 259, 260; 2 Cal. 30; 2 Cal. 284; Starkie on Ev. * 432.

II. The interlineation of important words in the certificates, unexplained, was a ground for the rejection of the depositions. Nor does it appear from the certificates, that either of the deponents corrected the deposition to which he subscribed his name, or that he was allowed or had opportunity to correct it, or that he did not wish to correct the same after it was read. *Lockhart v. Mackie*, 2 Nev. 295; Stats. 1869, 259, Sec. 409; *Bell v. Morrison*, 1 Peters, 351; 7 Curtis's Decisions, 614; *Penbleton v. Forbes*, 1 Cranch, C. C. 507; 2 Cranch, 1907; 1 U. S.; *Evans v. Hettick*, 3 Wash. C. C. 414.

III. There was error in excluding the execution offered by defendant. The omission of the name of the person whose property was directed to be levied on was a mere clerical error, which was explained by the exception itself. A clerical error does not invalidate an execution. *Thomer v. Pinckney*, 1 Rep. Const. Court, (S. C.) 323; *Lewis v. Avery*, 8 Ver. 289.

IV. There was error in finding the value of the property and in finding damages; value alleged and all damages being denied in the answer, and no proof in either respect being offered. The evidence was also insufficient to sustain the decision.

Thomas E. Haydon, for Respondents.

I. The stipulation admitted the official character of L. P. Fisher, and authorized him to take the deposition. No further proof was necessary. *Sargent v. Collins*, 3 Nev. 266; 1 Paine, C. C. 362; *Nasse v. Smith*, 2 Cranch, 31; 3 Cranch, 112; 5 McLean, 5; 5 Cranch, 120.

II. The statute only requires the commissioner to take the answers to the interrogatories and reduce them to writing. It requires no reading over or correction of errors. Stats. 1869, 260, Sec. 414. This requirement only has place and reference to depositions taken in this State. Stats. 1869, 259, Sec. 409.

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III. The interlineations are not material; show no alteration in themselves; are not suggested to be improper, or not genuine, or altered, after leaving the commissioner's hands; are in his handwriting; and the court could as well judge of their genuineness over as on the line.

IV. The execution omitted to show whose property was to be levied upon or sold; but at any rate it was immaterial. The attachment and judgment were admitted and gave defendant all the rights that he would have had under the execution had it been admitted.

V. The answer contained no proper denial of the value of the property, and the omission to deny dispensed with proof of it. *Carlyon v. Lannan*, 4 Nev. 156.

VI. The allowance without proof of ten per cent. damages from the time of taking to the date of payment was proper. *Carlyon v. Lannan*, 4 Nev. 160.

VII. Every fact having any tendency to establish a fraud is directly in conflict with evidence on the part of the plaintiff. The court needs no authority to prevent its interference when there is a conflict of evidence. *State v. Yellow Jacket*, 5 Nev. 418.

By the Court, WHITMAN, J.:

In this action for the recovery of personal property, tried before the court, judgment was had, under the statute, for the property or its value in default of restitution; and legal interest was allowed from date of taking.

It is objected that the court erred in finding the value of the property without proof. The value was alleged in the complaint as five hundred and seventy dollars, United States gold coin, to which there was this denial on part of the defendant: "He denies that the property in the complaint described is or was, on the said 22d day of June, 1870, of the value of five hundred and seventy dollars, U. S. gold coin." Under this, there can be no doubt that the court, in the absence of further proof, could, upon the pleadings,

have found for any sum less than five hundred and seventy dollars. If by finding the exact amount, error occurs, it is of that infinitesimal character which can do no injury.

Again, it is said that interest should not have been allowed. In actions similar to the present, upon the question of rule of damages, it is held that legal interest may always be given as damages, without proof of special damage. *Beals v. Guernsey*, 8 J. R. 446; *Hyde v. Stone*, 7 Wend. 354; *Burrill v. Hopkins*, 4 Cow. 53; *Devereux v. Burgmin*, 11 Iredell, 490; *McDonnell v. North*, 47 Barb. 530; *Ripley v. Davis*, 15 Mich. 75; *Robinson v. Burrows*, 48 Me. 186; *Oriatt v. Pond*, 29 Conn. 479; *Derby v. Gallup*, 5 Minn. 119.

Certain depositions were admitted against the objections of appellant, as follows: "That the said depositions are neither of them authenticated by proper certificates, showing that they were taken before the proper officer authorized to take the same, or that the signature of the person purporting to have taken the same is genuine." "That the certificates to the said depositions do not show that said depositions, or either of them, were corrected by the said witnesses, or either of them, or that they had an opportunity to do so, before signing the same; that the words, 'the same having been previously read over to him by me,' were interlined in the certificate to the deposition of David Hemphill, and the words 'and that I read over the same to him before he signed the same,' in the certificate to the deposition of Andrew Blackie, were interlined therein in a different colored ink from that with which the balance of said certificates and the said depositions were written, and that no explanation of such interlineation was contained in said certificates, or otherwise shown."

These depositions were taken under this stipulation: "In the above cause it is hereby stipulated and agreed that the depositions of Andrew Blackie and David Hemphill, two of the plaintiffs in the above cause, may be taken before L. P. Fisher, a justice of the peace at Woodstock, in the county of Carleton, in the province of New Brunswick * * *"

This stipulation certainly concedes that there is a person

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named L. P. Fisher, occupying the official station of justice of the peace at the place named; and was an agreement, under the statute, upon that person to take the deposition. This is the statute quoted so far as is necessary for illustration. "Sec. 412. The deposition of a witness out of this State shall be taken upon commission issued from the court, under the seal of the court, upon an order of the judge or court, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace selected by the officer granting the commission, or to a commissioner appointed by the Governor of this State to take affidavits and depositions in other States or territories." "Sec. 414. The commission shall authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to interrogatories, or when the examination is to be without interrogatories in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope directed to the clerk or other person designed or agreed upon, and forwarded to him by mail or other usual channel of conveyance." Stats. 1869, p. 260.

Referring to the citation it will be seen that no method of identification is provided; that any person, whether judge, justice of the peace, or commissioner is, for the nonce, the officer and commissioner of the court whence the commission issues. One thus certifying himself must, therefore, be deemed to have shown *prima facie* that he is the person designated. It is not suggested here that the deposition was not in fact taken by the party named; but that such taking is not proven under the following certificate, substantially the same in each deposition: "The execution of the commission to examine Andrew Blackie and David Hemphill, directed to me, issued out of said court on the eighth day of the month of May, will appear by the papers hereto annexed. Given under my hand and seal, in town of Woodstock, county of

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Carleton, province of New Brunswick, dominion of Canada, this twenty-ninth day of May, A. D. 1871.

[SEAL.]

LEWIS P. FISHER, J. P., C. Co.

* * * * *

On the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and seventy-one, at the town of Woodstock, in the county of Carleton, province of New Brunswick, dominion of Canada, came David Hemphill, the aforesaid witness, and deponent, who being by me first carefully examined and sworn to testify the truth, and answer each and every of the interrogatories and cross-interrogatories annexed to the commission hereto affixed, gave the several answers above and within written, which were reduced to writing by me, and by him subscribed in my presence, pursuant to the authority contained in said commission, the same having been previously read over to him by me. All which I hereby certify.

L. P. FISHER,

Mayor of said town of Woodstock, county of Carleton,
and a justice of the peace in and for the same."

In the view taken of the statute, this certificate is *prima facie* sufficient; so the objection cannot stand. *Sargeant v. Collins*, 3 Nev. 266; *Ruggles v. Bucknor*, 1 Paine, C. C. 359.

The interlineations were of nothing material, as the statute does not prescribe any form of certificate as to depositions taken out of the State, nor any matter to be specially set forth therein, save as it is to be gathered from section 414, before quoted; which would be satisfied by the certificate of the commissioner that he had administered an oath to the witness, and taken his deposition in answer to the interrogatories; or when the examination was without interrogatories, in respect to the question in dispute. Again, it is not pretended that the interlineations were not in the handwriting of the remainder of the certificates; nor that the depositions were not properly returned to the clerk of the court, and by him securely kept until opened by counsel in

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his presence, as by statute provided; so there would seem to be no more call for explanation upon one party than the other; the paper having been continually, except when absolutely *in transitu*, in keeping of the court's own officer.

No harm followed from the exclusion of the execution; in view of the proofs previously made, it was immaterial.

That the evidence is insufficient to warrant the judgment can not be maintained, as there is substantial testimony for its support. In fact, the case seems to have been fairly tried and properly decided, both in fact and law.

The order and judgment appealed from are affirmed.

GARBER, J., did not participate in the foregoing decision.

WILLIAM D. HARDEN, APPELLANT, v. CHARLES W. CULLINS, RESPONDENT.

EFFECT OF QUITCLAIM DEED OF PUBLIC LAND. Though courts have gone a long way to sustain equities where any contract or trust existed in regard to pre-emption claims, none has gone so far as to hold that a quitclaim deed by a person, who afterwards pre-empted and obtains a patent, conveys all the right, title, and interest in and to the land deeded, present and prospective; especially when the pre-emption claim had no existence at the date of the deed.

QUITCLAIM DEED AFFECTS ONLY PRESENT RIGHT. A quitclaim deed can operate only as a release of what title or right the vendor had in the land at its date.

TITLE OF PATENTEE OF PUBLIC LAND UNAFFECTED BY HIS PREVIOUS QUITCLAIM DEED. Where Cameron and Cullins occupied unsurveyed public land in common, and Cameron made a quitclaim deed of all his right, title, and interest therein to Cullins, but afterwards forcibly drove Cullins off the land, and himself pre-empted and obtained a patent to a portion of it—Cullins, in the meanwhile, taking no measures to pre-empt: *Held*, in an action to quiet the title of the land patented as against Cullins, that he had no claim to such land which equity could be called upon to enforce.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action to quiet the title of a tract of one hundred and eighteen acres of land in Washoe County. The suit was originally commenced in that county, but afterwards transferred to Storey. The judgment of the court below

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was to the effect that defendant was the owner of so much of the land claimed as lay within the boundaries of the Steamboat Springs Ranch, and the plaintiff the owner of the balance; denying the prayer of the complaint as to the former and granting it as to the latter. The plaintiff appealed.

Williams & Bixler, for Appellant.

I. The defendant stands in no privity with the United States, and hence can not question the validity of the patent, or claim that it inures to his benefit. *Dunn v. Schneider*, 20 Wis. 509; *Mahoney v. Van Winkle*, 33 Cal. 458; *Tyler v. Green*, 28 Cal. 408; *Doll v. Meador*, 16 Cal. 324; *Kile v. Tubbs*, 23 Cal. 442; 29 Cal. 310; 27 Cal. 484; 2 Nev. 280; 17 Cal. 58; 33 Cal. 74; 17 Cal. 60; 32 Mo. 28; 28 Cal. 501; 39 Mo. 595.

II. The conveyance made by Cameron to defendant in 1863 was merely a quitclaim deed, and did not operate to vest the subsequently acquired title. It only passed such interest as the grantor had at the time it was made and which he could lawfully convey. *Gee v. Moore*, 14 Cal. 472; *Morrison v. Wilson*, 30 Cal. 344; *Cadiz v. Majors*, 33 Cal. 289; 37 Cal. 471; 1 Cow. 613; 14 Johns. 194; 39 Mo. 566; 4 Mass. 688; 18 Cal. 465; 25 Cal. 154; 14 Cal. 613.

III. At the time Cameron made his deed to defendant he had no pre-emption right. The land had not then been surveyed by the government or declared open for entry. Nor does it appear that he then was possessed of the qualifications of pre-emptioner. *Quoad* the government he was a mere intruder or trespasser. Hence his deed conveyed nothing so far as the government or its grantee is concerned, and as between Cameron and defendant only the naked possession. *Kile v. Tubbs*, 23 Cal. 442; *Page v. Hobbs*, 27 Cal. 286; *Doll v. Meador*, 16 Cal. 331; *Vansickle v. Haines*, 7 Nev. 249.

IV. To give the defendant any standing in court he must have shown that he was the true owner of the superior equitable title to the land, and could have demanded of the officers

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of the government that the patent be issued to him. The inchoate pre-emption right commenced with the entry of Cameron, after the land was surveyed. That right was a right to obtain the fee and culminated in the patent. The defendant, by Cameron's deed to him, obtained no equitable right as to the fee, either as against the government or Cameron. Having but a bare trespasser's right, there was nothing in the case upon which a trust could be predicated. To declare a trust under the circumstances would be a violation of the spirit and policy of the pre-emption laws. It would have an effect of vesting the fee of the public lands in parties not possessing a single qualification, or complying with a single one of the provisions of the pre-emption laws.

V. Even if Cameron, when he made the deed of July 27, 1863, had expressly agreed to pre-empt the land, get the patent and convey to defendant, the agreement would have been void by the very terms of the pre-emption laws. What could not be done directly because against the policy of the law or contrary to statute, cannot be accomplished indirectly. A court of equity can recognize no such trust. See *Hill on Trustees*, *45, 70; 1 *Brightly's Dig.* 473; *Leggett v. Dubois*, 5 *Paige*, 117; *Phillips v. Hammond*, 2 *W. C. C.* 441.

Thomas E. Haydon, for Respondent.

No brief on file.

By the Court, WHITMAN, J. :

This case turns upon the findings and conclusions of the district judge. Appellant claims that the conclusions have no sound basis in the facts found. Substantially, these are : That appellant's grantor, in whose place, for all practical purpose of this action, appellant stands, was in July, 1863, tenant in common with respondent of four hundred and twenty-five acres of the public unsurveyed lands of the United States; and then and there so being, made, executed, and delivered to respondent a quitclaim deed for his interest therein. By consent, he was allowed to remain in posses-

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sion until February, 1864, when by force and threats he drove respondent out of possession, and in the succeeding month made his declaratory statement of pre-emption in the proper office, and subsequently obtained a patent for one hundred and eighteen acres of land, a portion of which—what does not appear—is included in the calls of the quitclaim deed before mentioned.

It is sought in this suit to quiet title to the land described in the patent. The district court has decided that no such right exists, as to the land within the calls of the deed; hence this appeal. It is held, "That the conveyance made by said J. W. Cameron to the defendant on the 24th day of July, 1863, operated to convey to the defendant [respondent] title in fee simple absolute to the land described therein, known as the Steamboat Ranch, and that the title afterwards acquired by said J. W. Cameron by virtue of said patent to the land claimed by the plaintiff, [appellant] so far as the same lies within the boundaries of said Steamboat Ranch, inured to the benefit of defendant, [respondent] and said Cameron's title by pre-emption and patent to the land described in plaintiff's [appellant's] complaint, immediately upon the purchase by said Cameron from the government, passed to said defendant the legal estate in so much of said land pre-empted and purchased by said Cameron, as lay within the boundaries of said Steamboat Ranch, conveyed by said Cameron to defendant [respondent] as aforesaid by virtue of the deed from said Cameron to said defendant," [respondent.]

Counsel attempts to support this position upon the basis mainly of a fraud, claimed to have been perpetrated upon respondent, which he urges should and does cause the patent to inure to his benefit. It is claimed that the deed spoken of carried the fee simple title to the land therein described, and reference is made to a decision of Commissioner Hendricks, of the general land office, in support of such assumption. It was there ruled with regard to what is called an unqualified quitclaim deed, executed ten months before the entry of the land called for therein, that it was in

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law an "agreement" or "contract," by which the title which Harbach [pre-emptioner] might thereafter acquire from the government of the United States "should inure in whole or in part" to the benefit of another person. At the time of the conveyance his title to the land, if he had any, was merely inchoate. It was to be perfected at a future time. By giving an unqualified quitclaim deed he conveyed all his right, title, and interest in and to the land deeded, *present* and *prospective*: while, therefore, the title of the vendees could only have been perfected, so far as the rest of the world was concerned, upon the perfection of Harbach's title, yet so far as he [Harbach] was concerned their title was perfect from the day of the execution of the deed. It follows as a consequence that, as they never redeeded to Harbach, the "agreement" or "contract" made in January, 1857, between the vendor and vendees aforesaid, was such a one as, had the fraud been consummated, would have caused the title which Harbach might have acquired by patent from the government to have inured "in whole or in part to the benefit of other persons besides himself." Lester Land Laws, Dec. 532.

This opinion holds substantially in accordance with other decisions of the office that the transfer of a pre-emption claim or right is void. Lester, Decs. 424, 429, 616. Such also is the ruling of some courts. *Camp v. Smith*, 2 Minn. 155; *Glen v. Thistle*, 23 Miss. 42; *Craig v. Tappin*, 2 Sand. Ch. 78. Yet while thus holding, the commissioner draws the somewhat singular conclusion that on concealment of the fraud a patent issued to the vendor would inure to the benefit of the vendee in a void conveyance.

Courts have gone a long way to sustain equities, or supposed equities, where any contract or trust existed in regard to pre-emption claims, but never quite so far as the decision quoted, or to hold that a quitclaim deed conveyed all right, title, and interest in and to the land deeded, present and prospective, especially when, as in the case cited, the pre-emption claim had no existence at the date of the instrument.

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The doctrine of the equitable rulings on this subject may be admitted in its broadest extent, and yet will not include this case on the facts. There were two parties, Cameron and Cullins, tenants in common of a tract of four hundred and twenty-five acres of unsurveyed land belonging to the United States. There was then no right of pre-emption existing in either, supposing them both competent to pre-empt, which no where in the record appears, because the land was not in the required condition for the exercise of any such right. Had the land been surveyed and open to pre-emption, there could have existed no common or joint right of pre-emption, (*Spalding v. Wood*, 8 Wis. 195,) and it would seem paradoxical to hold, that nothing could be rendered something by the release of either to the other. The occupancy of these parties was that peculiar kind of right, based solely on possession, recognized generally for temporary purposes by the legislatures of territories and new states, any interference with which gives a right of action for the recovery of possession, but from which originates no right or inception of right against the paramount title of the United States: that can only arise in the case of the occupancy by one qualified to pre-empt, of such portion of the unsurveyed lands of the United States as, when surveyed and offered, would constitute a pre-emptive division or subdivision. The license expressed or implied of the government on the one hand and the intention of the settler on the other, each and both of which are presumed to exist in such case, here have no being.

Suppose, however, a right of pre-emption to exist in each of these parties, to what portion of the land shall it be applied? Shall it be said that by this deed Cameron forever barred himself of any right to pre-empt any portion of the land? That would be, to say the least, a harsh doctrine, and one without any benefit to Cullins; for as soon as the land was surveyed his possession must yield, save for one hundred and sixty acres, to any person able and desirous to pre-empt.

But if this case is viewed in a stronger light than the facts

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warrant, still it can not be sustained as claimed. The quit-claim deed could operate only as a release of what title or right the vendor had in the land at its date. Suppose that to have been a pre-emption claim or a present right to pre-empt, still even that would not cause the patent issued to the vendor to inure to the benefit of the vendee; and in this respect the opinion of Commissioner Hendricks must yield to the decided cases. *Prink et al. v. Darst*, 14 Ill. 304; *Phelps et al. v. Kellogg*, 15 Ill. 131. The first of these cited cases is so full upon nearly all the points made in this case that it is specially referred to and adopted, as it is impossible to quote from it satisfactorily without transferring it entire. In the latter case it is said, and could not be more aptly expressed to cover this case under the facts now assumed, which are stronger than the reality: "The fact that Bogardus made proof of a pre-emption to the satisfaction of the land officers gave him no title to the land. It merely established a right in him to enter the land at the minimum price. He had to make the entry and pay the purchase-money before he could obtain any title whatever. Until that was done the title remained exclusively in the United States. At the date of the deed the government had not parted with the title. Bogardus had, therefore, no title to release, and Underhill acquired none under the deed. As between the parties, Underhill succeeded to the possessory rights of Bogardus. By the force of our laws he became entitled to the possession of the land, and might recover the possession from Bogardus by action of ejectment. He could also retain the possession against third persons, so long as the land continued to be the property of the United States. But these possessory rights wholly ceased on the entry of the land. They could not be enforced against those deducing title from the United States. Bogardus acquired the complete legal title by the entry, and he could then compel Underhill to surrender the possession. He could maintain ejectment against Underhill, because the latter could neither show title in himself, nor an outstanding title in a third person. The fact that the land was entered with the money of

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Underhill does not affect the question of title in this case. This is an action at law and the legal title must prevail. The court cannot inquire into the equities of the parties. They must be ascertained and adjusted in another forum. Where land is purchased in the name of one person with the funds of another, the legal estate is vested in the former. The latter acquires only an equitable estate, and he must resort to a court of equity to enforce it against the legal title. He cannot assert it in an action of ejectment. It may perhaps be, that a trust resulted in favor of Underhill by the payment of the purchase-money. If so, he and those claiming under him must seek relief in a court of equity. It is only in equity that it can be enforced against the legal estate. The trust results from the payment of the money and not because of the prior conveyance. The deed only professed to release the present interest of Bogardus in the land; and as he had not at the time either the legal or the equitable estate, Bogardus had, at most, only the right to purchase the land within a specified time at a certain price, and a license to occupy the same until the termination of that right. Whether this right of pre-emption was assignable, so as to authorize Underhill to enter the land, is a question which does not arise. The land was not entered in his name, nor in that of the representative or assignee of Bogardus. The entry was made in the name of Bogardus and the title passed from the United States to him. He had not previously done any act which operated to transfer the title through him to Underhill. He was not estopped by the deed from asserting title against Underhill, for it contained no covenants express or implied. He did not undertake to convey an estate in fee, and therefore the after acquired title did not inure to the benefit of Underhill." 15 Ill. 135-6.

Some stress is laid in the finding of the court upon the fact that force was used against Cullins and that he was put in fear, and so driven from possession. This can not avail him in this action. Had he the capacity, and had he desired to pre-empt that portion of the land described in the patent,

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which was within the calls of his deed from Cameron, it would have been sufficient excuse before the land officers for non-occupancy, or non-improvement, to have shown that he was excluded by force or deterred by fear. Lester, Decs. 434, 483, 487, 500. He appears, however, to have made no movement in the land office, either affirmative or defensive; in fact, to have done nothing to preserve his rights in the property, if any he had, except to seek, without any apparent diligence in that attempt even, to enforce in the local courts his right of possession.

From what has been said it follows that there was no fraud on Cameron's part as claimed; and that Cullins has been deprived of no right to the property in dispute, and has no present claim to the title thereto which equity can be called upon to enforce. The decree of the district court must be so modified as to conform to the prayer of the complaint.

It is so ordered.

GARBER, J., did not participate in the foregoing decision.

DENNIS McFADDEN, RESPONDENT, v. THE ELLSWORTH MILL AND MINING COMPANY, APPELLANT.

AMENDED COMPLAINT ENTIRELY SUPERSEDES ORIGINAL. An amended complaint entirely supersedes the original, so that matter contained in the original and not in the amended one can not be considered by way of affirmative statement.

OBJECTION ON APPEAL TO COST-BILL. An objection to a bill of costs can not be maintained on appeal, when the bill is not properly made a part of the record on appeal.

APPEAL from the District Court of the Second Judicial District, Nye County.

This was an action to recover eleven hundred and seventeen dollars. The original complaint, which was verified, alleged that plaintiff, in March, April, and May, 1871, delivered to defendant, at its quartz mill in Ellsworth, fourteen and a

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half tons of silver ore to be crushed, worked, and reduced in the usual manner; that defendant agreed to crush, work, and reduce the same, and pay plaintiff eighty per cent. of the pulp assay value, after deducting the price of milling the same, at twenty-five dollars per ton, and the price of transporting the same to the mill, at five dollars and fifty cents per ton; that defendant crushed and worked the ore, and the assay value of the pulp, after making the usual addition of seven per cent. for the salt in said pulp, was \$134 47 per ton; and that there was due to plaintiff for said ore the sum sued for, which defendant refused to pay.

Defendant demurred on the grounds that defendant was not described in the complaint, and that there was no prayer for relief. The plaintiff then filed an amended verified complaint, in which he alleged that defendant was a corporation organized under the laws of Connecticut; that in March, April, and May, 1871, he delivered to defendant, at its mill in Ellsworth, fourteen and a half tons of silver ore to be crushed in the usual manner; that defendant received the same and agreed to crush it into pulp as aforesaid, and pay plaintiff therefor at the rate of eighty per cent. of the pulp assay value of the same; that defendant did crush it, and the assay value of the pulp was \$134 47 per ton; that there was due from defendant to plaintiff on said ore a balance of eleven hundred and seventeen dollars, which defendant refused to pay, and demanding judgment for said amount and costs. Defendant interposed a demurrer to the amended complaint, which was overruled; and it then answered fully, denying the allegations of plaintiff, except so far as they agreed with defendant's version of the controversy, which represented its debt for the ore crushed and worked, at eighty per cent. on the pulp assay value, as amounting to five hundred and seventy-two dollars and twenty cents.

The cause was tried without a jury by the court below, which found all the allegations of the complaint true except that the assay value of the pulp was \$134 47 per ton—the correct value being \$87 96 per ton. In accordance with the findings there was a judgment for plaintiff for ten

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hundred and twenty dollars and thirty-three cents, and two hundred and twenty-eight dollars and fifty cents costs. It appears that the cost-bill was filed within the proper time, but the clerk made an error in endorsing it as filed on October 2, 1871, instead of November 2, 1871.

On motion for new trial defendant claimed and assigned as error among other things, that the court below had not allowed it the price of milling, at twenty-five dollars per ton, and of transporting ore, at five dollars and fifty cents per ton, as alleged in the original complaint, claiming that such facts were admitted by the plaintiff. Nothing was said about the cost-bill on the motion, nor was it mentioned in this statement, or any statement.

The motion for new trial being denied, defendant appealed from the judgment and order.

E. P. Sine, for Appellant.

I. There was error in not allowing defendant any deduction for milling or for transporting the ore to mill. Counsel may object, and say that we have not proved that there were any expenses attending the reduction and transportation of said ore. This was not necessary, for the reason that it was admitted in the pleadings; and if not so admitted, then plaintiff's averment that defendant agreed to pay plaintiff eighty per cent. of the pulp assay value of said ore in U. S. gold coin was not admitted; and it certainly was not proved. This allegation thereby became an essential allegation, and every allegation essential to the issue must be proved. 1 Greenleaf, - 84, Sec. 60. Facts admitted need no proof. *Patterson v. Ely*, 19 Cal. 28.

II. The judgment is erroneous, because it allows to plaintiff two hundred and twenty-eight dollars and fifty cents as costs and disbursements incurred in said action, when it does not appear of record that said plaintiff filed a memorandum of the items of his costs as prescribed by statute. Stats. 1869, 169, Sec. 486.

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George R. Williams, for Respondent.

I. There is no admission by plaintiff in his pleadings that he is indebted to defendant for reducing and transporting the ore. The original complaint may admit it, but the amended complaint surely does not. The amended complaint supersedes the original, and destroys its legal effect. 22 Cal. 356; 28 Cal. 246; 33 Cal. 497. It is claimed that an original complaint can be used to explain away any ambiguity in the amended complaint. If the amended complaint is ambiguous, why not demur to it on that ground? But there was no ambiguity in the amended complaint. The cause of action was set forth in ordinary and concise language.

II. The point raised in reference to the costs cannot be considered by this court, as the cost-bill has not been brought before the court by any statement. As a matter of fact, however, the cost-bill was sworn to and filed within two days after the judgment was rendered; but when the clerk indorsed the filing thereon, he indorsed it filed October 2, 1871, instead of November 2, 1871. The mistake was a clerical error.

By the Court; WHITMAN, J.:

The pleadings and evidence in this case fully support the judgment. Indeed, so far as the substantial merits are concerned, the district court has adopted the theory of appellant's answer; and has only failed to fully support the same by reason of absence of proof of certain matters, not made upon the trial, apparently upon the supposition that there were two complaints in the suit, one original and one amended; and that the matter referred to was affirmatively stated by respondent in the original.

The amended complaint is in itself a full, distinct, and complete pleading, and entirely supersedes the original. *Gilman v. Cosgrove*, 22 Cal. 356; *Jones v. Frost*, 28 Cal. 245; *Barber v. Reynolds*, 33 Cal. 498. Not only was it not the

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duty of the district judge to notice it, but he had no right nor authority so to do.

There is nothing in the question of costs as presented which can be considered on appeal.

The order and judgment are affirmed.

GARBER, J., did not participate in the foregoing decision.

THOMAS PHILLPOTTS, RESPONDENT, v. H. G. BLASDEL, APPELLANT.

NEW TRIAL, WHEN TO BE GRANTED BY NISI PRIUS COURT. A judge who tries a cause should not hesitate to set aside the verdict, where there is a clear preponderance of evidence against it.

MINING LEDGE MAY HAVE SEVERAL NAMES. One and the same ledge may have two names, by which it may be known indifferently; and it may even become better known under a name derived from a subsequent and invalid location than under a name given it in an earlier and valid location.

SALE OF MINE BY ANOTHER NAME. When a person conveys a lode of ore, we have only to ascertain by the best means in our power what lode he meant; and if we can do so, it makes no difference that he has called it by a name illegitimately acquired by or applied to it.

NAME, HOW IMPOSED UPON LODE. Placing a notice of location headed with a certain name upon a lode of ore is to christen it with such name.

NOTICE OF LOCATION OF MINING CLAIM, WHERE TO BE POSTED. In order to hold a mining ledge, it is not necessary that the notice of location should be placed on the ore or any part of the vein or lode; it is sufficient if it be placed in such reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended.

QUESTION OF WEIGHT OF EVIDENCE--DIFFERENCE BETWEEN NEW TRIAL MOTION AND APPEAL. A *nisi prius* judge has jurisdiction on motion for new trial to decide as a question of fact, whether the scale of evidence against a verdict preponderates over that in favor of it; and his decision setting it aside will not be reversed by the appellate court except for the more cogent reasons, such as conclusive preponderance of evidence in favor of the verdict.

PRESUMPTIONS IN FAVOR OF ORDER GRANTING NEW TRIAL. In favor of an order of a *nisi prius* judge, setting aside a verdict as against evidence and granting a new trial, the appellate court will assume every fact for which the court below finds a clear preponderance of evidence and which the appellate court can not find a clear preponderance against.

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RELOCATION OF MINING CLAIM UNDER ANOTHER NAME. There is no law to prevent a person from relocating his own mining claim by a different name; and if he does so and then conveys it by the latter name, there is no reason why the existence of the former location should invalidate the deed.

BARGAIN AND SALE DEED—OPERATION OF STATUTE OF USES. When a person bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant and therefore void in law; but, though not a use which the statute can execute, yet still it is a trust in equity which in conscience ought to be performed.

EJECTMENT—OWNER OF LEGAL TITLE—PROPER PARTY PLAINTIFF. Where a deed of mining ground by grant, bargain, sale, remise, release, conveyance, and quit-claim was made to one person for the use and benefit of another: *Held*, that the former was the owner of the legal title and the proper party to maintain an action at law for a disturbance of the possession thereof.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The facts are stated in the opinion. A verdict having been found in the court below for defendant and plaintiff's motion for new trial having been granted, defendant appealed from the order.

Clarke & Lyon, for Appellant.

I. The court below erred in granting a new trial on the ground of insufficiency of evidence. The question is here, (as it was below) is the evidence sufficient in law? If there was some evidence to support the verdict, if there was a substantial conflict, then the new trial should have been denied. 4 Nev. 156, 304, 395. This rule is not changed by the fact that the judge trying the cause set aside the verdict. The intendments, which ordinarily lie in support of the verdict, are not reversed or otherwise disturbed by the adverse decision of the judge.

II. The new trial was granted because it was discovered there was no Colfax lode, and because the Colfax location notice was posted in reasonable proximity to the Ward Beecher lode. We submit, however, that the Ward Beecher claim, which was in fact upon a ledge, was not conveyed by the mere fact that the Colfax claim, which was supposed to be on a separate ledge but which was in fact upon no

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ledge, was conveyed. The reasonable proximity of the notice to the ledge can only be considered as evidencing the intention of the locator to take the ledge in question. But the intention to take the Ward Beecher ledge by the Colfax location, is conclusively negatived by the circumstance that it recognizes the Ward Beecher location, and is parallel to it, and by the circumstance that the locators claim the discovery of a ledge.

III. The proofs show that the plaintiff held the ground in suit (if at all) as agent and trustee of the Eberhardt and Aurora Mining Company Limited of London, England. The legal title vested in that company, and the action should have been prosecuted in its name. The common law was adopted by the legislature of Nevada, in 1861; and the statute of uses—(27 Henry VIII) which was enacted before the emigration of the colonists to America, was adopted as a part of the common law. 4 Kent, 299; 1 N. H. 237; 3 N. H. 239; 4 Mass. 136; 6 Mass. 31; 3 Binney, 619; 10 John, 456, 505. Under the operation of the statute of uses we claim that Phillpotts, under the deed, was the trustee of an executed trust; that the legal estate conveyed to him was immediately vested by the statute in the *cestui que trust*, to wit: the Eberhardt and Aurora Company; and that therefore the action should have been brought in the name of that company.

IV. Blasdel's deed to Drake does not put the title out of Blasdel. As to the Ward Beecher, it is admittedly void for uncertainty. But the mention in the deed of the Ward Beecher excludes the idea that the Ward Beecher was intended to be conveyed under the name of Colfax; and if not intended to be conveyed as Colfax and not sufficiently described as Ward Beecher, how could the Ward Beecher ledge be conveyed in that deed?

V. The Ward Beecher location is oldest in time and therefore first in right. It is on the ore channel or lode described in the proofs, and is the only ledge shown to exist. As there is but one lode, and that is the Ward Beecher, there can be no Colfax lode, unless the Ward Beecher is known by the name of Colfax, which is not shown nor

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attempted to be shown. The Ward Beecher lode cannot pass by the name Colfax unless it was so known and intended. It was not so known and intended, therefore it did not pass.

VI. There can be but one valid location or perfect legal title to the same mining ground, claim, or lode, within the same area. It follows, of necessity and conclusively, that if the Ward Beecher is a valid location, the Montrose, Colfax, and Barris & Sproul, if located on the same lode and within the same area by the same parties, are void. It follows, with equal certainty, that if (as admitted) the Ward Beecher location and title were perfect, no other title could be acquired to the Ward Beecher claim or lode, in virtue of the subsequent location of the Colfax, Montrose, or Barris & Sproul on the Ward Beecher lode, as such. And as no legal title could be acquired by a second and void location on the same lode within the same area, *a fortiori* no valid title could be acquired to the Ward Beecher lode, previously located, by the subsequent location of supposititious or imaginary lodes within the same superficial area.

Thomas Wren and F. W. Cole, for Respondent.

I. The weight of evidence need not be so decided and great, to authorize a *nisi prius* judge to set aside a verdict, as is required by an appellate court. Such appears to be the doctrine laid down in all the books; and an appellate court will not interfere with the order of the court below unless in the trial of the case some legal principle was violated, which would have been fatal had the respondent gained the verdict. See *State v. Yellow Jacket M. Co.* 5 Nev. 415.

II. Phillipotts is the proper party plaintiff to the action. The legal estate is vested completely in him as trustee, and there is no limitation in time to the estate; in fact no limitation whatever, except that the trustee holds it for the benefit of the Eberhardt and Aurora Company. There might be perhaps a controversy between the trustee and the *cestui que trust* as to the status of each one in this matter; but as far as third parties are concerned plaintiff is

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the trustee of an express trust, and is entitled to sue. The person having the legal title, or one who has had possession and been ousted, is the only person who can sue in ejectment. See 4 Denio, 385; 1 Hill on Trustees, 753; *Tyler v. Houghton*, 25 Cal. 29; *Considerant v. Brisbane*, 22 N. Y. 389; Stats. 1861, 19; Cruise's Digest, Title 12, C. 4, S. 4; *Binney v. Blumsley*, 5 Ver. 500.

III. If the English statute of uses be in force in this State which we deny, for our statutes recognize "trusts and powers over and concerning lands," still there was no common law use created by the deed under consideration. The fee was conveyed to Phillpotts and the use to the corporation. A trust is always created when, by the terms of the deed, it can be inferred; or, in the language of the supreme court of California, in *English v. See Yup Co.*, 17 Cal. 44, "A deed of bargain and sale may be upon trust in favor of a third party, if words expressive of that intent be used."

IV. The deed from Blasdel to Drake conveyed the premises. The first description, under the name of the Ward Beecher, was defective; but the second was good, as the premises can be made certain and identified. It is shown that the Ward Beecher, Colfax, and Montrose claims are one and the same, or in other words that they are all in the same body or deposit of ore. Blasdel's deed to Drake therefore did not pass a name or a "supposititious ledge," any more than a deed to land passes imaginary land or castles in the air: it passed just what it purported to pass—all his "right, title, interest, and estate." See 9 N. Y. 49; Stats. 1861, 21.

By the Court, GARBNER, J.:

This is an appeal from an order granting a new trial. The grounds upon which it was granted are thus stated by the district judge: "This is an action brought to recover possession of twenty feet of the Ward Beecher ledge, lying immediately south of a line drawn east and west through a point at the south side and east end of the Ward Beecher

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cut. The jury gave a verdict for the defendant, and the plaintiff now moves for a new trial, on the sole ground that the evidence is insufficient to justify the verdict.

“The Supreme Court of this State (in 5 Nev. 422) has very clearly laid down the rule that ought to guide a district judge in passing upon a motion for a new trial, based upon this ground. ‘The judge who tried the cause should not hesitate to set aside a verdict, where there is a clear preponderance of evidence against it.’ I shall proceed, therefore, after a preliminary statement of the case, to consider, first: what facts have been established by a clear preponderance of evidence, and, second: whether or not the verdict is consistent with the facts so established. In finding the facts, I shall confine myself as strictly as possible to the statement which has been agreed upon by the attorneys, although I find, after an examination of it, that the statement is very imperfect. Much that I deem important is altogether omitted; much that it contains is unintelligible to one who did not witness the trial; and several matters included might as well have been omitted.

“Having heard all the testimony twice, and two arguments of the case, it is certainly difficult, and perhaps impossible, entirely to escape the influence of impressions already fixed. I shall endeavor, however, to look alone to what the statement contains, and to interpret it solely by its own light. It is agreed, on the first page of the statement, that the plaintiff was in possession of the ground in controversy on the third day of July, 1871; that, on or about that date, the defendant entered thereon, took possession thereof, and commenced mining and extracting ore therefrom, and was so continuing to do and holding the ground adversely to the plaintiff at the date of the commencement of this action. The contest between the parties was solely as to the right to the possession. Whichever was entitled to the possession at the date of the commencement of this action was entitled to a verdict. It was conceded that the defendant had the title to the ground in September, 1869, acquired by purchase from the original locators. The plaintiff claimed that the

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defendant, by his deed to Drake of September 25, 1869, had conveyed the ground to Drake, and that by subsequent conveyance from Drake to Roberts, and from Roberts to the plaintiff, the title had vested in him.

“The defendant contended that he had not conveyed the ground to Drake, and, therefore, that the title was still in him. There was no dispute as to any other link in the chain of title, and the case, as submitted to the jury, depended solely upon the question, whether or not Blasdel conveyed the ground in controversy to Drake by the deed of September 25, 1869. If he did the verdict was to be for the plaintiff, if he did not for the defendant. The defendant, it is true, relied upon some special matters in defense under which he claimed to recover, even though it should be held that he had originally conveyed the ground to Drake. But these defenses were excluded. The offer to prove them was overruled; and, as the matters were not gone into, it can not now be known that the defendant would have made even a *prima facie* case on his offer, or that the plaintiff would not have successfully rebutted any evidence which he might have submitted. The mere offer to prove can not, therefore, affect the merits of this motion. If the questions of fact which were submitted to the jury were erroneously decided, the plaintiff is entitled to a new trial.

“The decision of this motion, then, depends upon the question whether the deed from Blasdel to Drake effected a conveyance of ‘that twenty feet of the Ward Beecher ledge, lying immediately south of a line drawn east and west through a point at the south side and east end of the Ward Beecher Cut.’ The material portion of the description contained in the deed in question is as follows: ‘All that portion of the claim known as the Ward Beecher, commencing at the south side and east end of a long cut running easterly and westerly, generally known as the Ward Beecher Cut. Also all my right, title, and interest in the Montrose, Colfax, and Barris & Sproul lodes, lying south of a due east and west line drawn from the south side and east end of the above mentioned cut,’ etc. The plaintiff concedes that

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nothing was conveyed by this deed under the *name* of Ward Beecher, on account of incurable defect in that portion of the description. But, as Blasdel clearly does convey all his right, etc., to the Colfax lode south of the line which is the northern boundary of the ground sued for, the plaintiff claims that Drake acquired title to all of the Ward Beecher ledge south of that line, for the reason that, what Blasdel and Drake called the Colfax lode was and is, in fact, nothing else than the Ward Beecher ledge.

“The position of the plaintiff, stated in general terms, is this: there is a lode or ledge—a connected deposit of silver bearing ore and concomitant vein matter—extending north and south through Treasure Hill, a distance of four hundred feet and over. It does not crop out on the surface in the shape of solid ore, but at different points the surface presents indications of its subterranean existence in the shape of vein matter cropping out—that is, by the occurrence at the surface of small bunches of ore, mixed with the vein matter of the district, broken lime, and spar. In 1867, before the ground was at all developed, Barris and Sproul posted the Ward Beecher notice on these croppings, near the north end of the lode, claiming by location six hundred feet of that ledge, three hundred feet north and three hundred feet south from the location monument, which stood at the south side and west end of the present Ward Beecher Cut. This notice was recorded and the claim perfected by compliance with the mining laws as to work, etc..

“Afterwards, in June, 1868, Barris and Sproul, and Hart and Harps posted the Colfax notice, at a point three hundred and twenty-five feet south of the Ward Beecher monument, on the croppings of the same lode. The ground being still undeveloped, the identity of the lode was not known, although it may have been suspected. The locators, however, claim a thousand feet—Hart and Harps taking six hundred, including the discovery claim, south from the monument, and Barris and Sproul the remaining four hundred feet, north from the monument. The Colfax monument is a few feet south of the south end of the Ward Beecher claim;

but the four hundred feet claimed by Barris and Sproul extends north beyond the ground in controversy. The Colfax notice is recorded, and Hart and Harps do a large amount of work under it, near the point of location, sinking the south Colfax shaft, running a drift, etc. After this, Barris and Sproul convey both claims to Blasdel. Blasdel does work at both locations and under each claim, calling the lode the Colfax at one point and the Ward Beecher at the other. Then he conveys all his right, etc., to the Colfax lode to Drake. Subsequently it transpires that the Ward Beecher lode and the Colfax lode are one and the same thing. The plaintiff contends that, although this discovery reduces the Colfax location as a basis of right to the ground to a nullity, it does not impair the effect of the conveyance of the lode, nor prevent the name of Colfax from having been, at the date of the conveyance, a good means of description of the lode. The defendant conveyed a lode or deposit of ore, not a right derived from the Colfax location. He owned that lode under the Ward Beecher location, but he conveyed it by the name given it in the Colfax location.

"The defendant disputes not only the facts out of which the plaintiff frames his hypothesis, but also the correctness of the legal conclusion. Upon the latter point, if I have understood him correctly, he contends that, if the Colfax was located on the same ledge claimed under the Ward Beecher notice, the Colfax location was a mere nullity for two reasons, viz: Barris and Sproul were incapacitated by their previous location from making any further claim on that ledge, and Hart and Harps, by locating a discovery claim on a previously discovered ledge, committed a fraud on the policy of the law which rendered the whole claim utterly void. Consequently, the Colfax lode never had an existence, and nothing could pass by conveyance under that name. Moreover, it already had the name of Ward Beecher and continued to retain it, and could not, therefore, be called the Colfax; and, further, all proof of the identity of the two ledges is incompetent, because it tends to vary and contradict the terms of written instruments, to wit, the notices of

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location and the deeds, in which the lodes are spoken of and treated as distinct. I can not appreciate the force of these objections. There is no solecism involved in the idea that the same ledge may have two names by which it may be known indifferently, especially when it is not known that the parts of the ledge to which the different names are applied are identical; nor is it absurd to suppose that a ledge might become as well or better known under a name derived from an invalid and subsequent location than under that given it in the earlier and valid location. As to the deed and notice, they prove, at most, that, at the time they were made, the Colfax and Ward Beecher were considered distinct; and certainly it is not incompetent, for the purpose of giving proper effect to them, to prove that it has since been discovered that the claims are on the same ledge.

“I agree with the plaintiff that when a man conveys a lode we have only to ascertain, by the best means in our power, what lode of ore he meant; and, if we can do so, it makes no difference that he has called it by a name illegitimately acquired—a name only applied to it by reason of his ignorance of the truth. Effect must be given to his real intention, and the lode intended must be held to have been conveyed. Do the facts sustain the plaintiff’s hypothesis? Without referring to any particular portion of the testimony, I presume that it will not be disputed that the statement and the maps referred to and made part of it, show that two immense chambers have been excavated from almost solid milling ore—the one connected by a shaft and cut with the Ward Beecher location and embracing the ground in controversy, the other commencing at the bottom of the Colfax shaft.

“Although bodies of lime and spar may have been found in these chambers among the ore, there is no dispute as to the ore in the respective chambers having been connected and continuous. The only question is whether the two chambers are on the same body of ore, that is, whether ore is continuous between them. As they are not actually connected by any drift or other workings, this is necessarily a

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matter of inference, to be determined by the opinion of experts and natural probabilities. The north chamber connected with the Ward Beecher location has been excavated towards the north some distance beyond the point of location and, in the opposite direction, nearly half way to the Colfax. The chamber under the Colfax shaft is worked out a considerable distance to the south of that shaft, and towards the north to within twenty-five feet, horizontal measurement, of the nearest point in the Ward Beecher chamber. That is to say, for a distance north and south of about four hundred feet two large continuous bodies of ore are found approaching each other, with a space of twenty-five feet of unexplored ground between. In regard to that space of unexplored ground, what inference shall we adopt? Is it ore and vein matter, or is there a solid barrier of country rock interposing between two distinct bodies or deposits of ore? I think there is a very decided preponderance of evidence in favor of the identity.

"It is true that it is shown that a spar-seam crosses the south end of the Ward Beecher chamber. What inference it is expected will be drawn from the mere proof of this spar-seam, I do not know. There is no evidence in the statement as to what a spar-seam is or indicates. No witness swears that it constitutes a division between lodes in general, or in this instance; and, if we assume that we know no more about it than the statement discloses, then its existence proves nothing. But if, on the other hand, we may take notice of its character independent of testimony as a matter of common notoriety, then we know that the spar of this district—calc-spar—is simply crystallized carbonate of lime. The original solid lime-rock is dissolved in water, carried into every accessible cavity or fissure, and crystallizes in coarse crystals, filling the cavity, and is called spar. It is necessarily of comparatively recent formation; and, where a seam of it is found cutting across the country with ore contiguous to it on either side, the plain and inevitable inference is that, at some epoch subsequent to the deposit of the body of ore, a fissure occurred which in process of

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time has been filled with the spar. Of course, therefore, its existence is no impeachment of the identity of the bodies of ore in which it occurs. The fact that the rock behind this spar-seam contains but little ore, proves nothing. The testimony is that the Ward Beecher chamber is on a level; and the map shows that, at the south end it breaks out to the surface, while at the whim shaft the bottom of the chamber is ninety feet deep. The memoranda connected with Attwood's assays show that the deepest point from which he took specimens at the south end of the Ward Beecher chamber, was forty-five feet from the surface. From this slight testimony, which is all I can find in the statement bearing on the point, the truth may be inferred—that the hill slopes from the north to the south, and that the farther south you go on the Ward Beecher chamber the nearer you approach the surface. Bearing this in mind, it will not appear surprising, but on the contrary most natural, that the testimony should show that the ground back of the spar-seam—near the surface as it is—is composed of debris, broken lime, spar, and surface dirt, mixed with a little ore. Such is the character of the surface from one end of the claim to the other. It is vein matter, but not solid ore. It is seventy-four feet from the mouth of the Colfax shaft to the top of the 'lady's chamber,' and solid ore is not found in that shaft till you reach within nine feet of the top of the chamber—the rest of the shaft passes through a debris of broken lime, spar, etc.; mixed with occasional bunches of ore.

“The testimony introduced by the defendant as to the want of connection between the location point of the Montrose, and the ore in the Montrose shaft—which are, respectively, a few feet north and south of the Ward Beecher cut—shows that the surface about the Ward Beecher cut is of the same character, and that it is at some depth that milling ore is encountered at that point. The numerous shafts sunk throughout the distance between the Ward Beecher and the Colfax and the proved depth of some of them and the depth of the large chambers out of which milling ore has

been taken, in the absence of more direct testimony, prove satisfactorily two things, which in point of fact are true, that the solid milling ore does not come to the surface and that the vein matter does. For, if the ore came to the surface, it would be worked from the surface; and the shafts would not have been sunk if the vein matter had not cropped out to indicate the existence below of something to sink for. I consider myself amply warranted in finding that it is established by a clear preponderance of testimony, that there is one lode or deposit of ore extending from north of the Ward Beecher location to the south of the Colfax.

“In November, 1867, Barris and Sproul located the Ward Beecher by posting the notice on a monument, erected at the west end and south side of the Ward Beecher cut. They recorded and perfected their claim by full compliance with the mining laws and acquired a perfect title to six hundred feet of the lode, extending three hundred feet to the north and three hundred feet to the south from the monument. Afterwards, on the twenty-seventh of June, 1868, in conjunction with Hart and Harps, they located the Colfax—Barris and Sproul taking the four hundred feet to the north of the notice, and Hart and Harps taking the six hundred feet, including the discovery claim, to the south. There is some conflict of testimony as to the exact point of the Colfax location. But it is immaterial where exactly it was made. Taking the defendant's own testimony, which I shall adopt on this point, it was about three hundred and ten feet south of the Ward Beecher monument, ten feet east and ten feet north of the south Colfax shaft, and twenty-five feet south of the north Colfax shaft. This location was recorded and perfected by work done by Hart and Harps; or, if their work did not apply to the north end, then by work done by Blasdel after his purchase. Barris and Sproul then sold the Ward Beecher and Colfax claims, together with the Montrose and the Barris & Sproul, to Blasdel. (Deed of Oct. 8, 1868.) Blasdel then commenced work on the ground, and, prior to his sale to Drake, in September,

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1869, had made some slight developments. The testimony as contained in the statement does not show with any clearness the state of development of the ground at the date of that deed. This is to be regretted, as it is desirable in endeavoring to arrive at the intention of the parties to place ourselves as nearly as possible in their shoes, to know what they knew, to be ignorant of all they did not know, to see the ground as they saw it.

"We can only gather from the statement that a slight amount of surface work had been done in the vicinity of the Ward Beecher cut. That cut had been made and some other open cuts or trenches, and the Autumn shaft had been started. At the Colfax, Hart and Harps had sunk the south Colfax shaft, finding ore at a depth of twelve feet, and had run a little drift from the bottom of the shaft to the south. Blasdel had commenced the north Colfax shaft, (I take his own testimony on this point.) It does not appear to what depth it had reached; but Blasdel says he had commenced sinking it—that he was sinking for a ledge and doing it for the Colfax. Down the hill to the west, Blasdel had sunk the Ward Beecher shaft 'all the way down,' that is, I suppose, to its present depth.

"This is about all we can gather as to the state of development on the ground at the date of the deed. Under these circumstances, Blasdel conveyed to Drake all his right, etc., to the Colfax lode, etc. What lode? What deposit of ore did he have in his mind when he said Colfax lode? The notice of location of the Colfax claim was headed 'Colfax Lode.' Placing it upon a lode was to christen it by that name. Blasdel himself had commenced a shaft which he called the 'North Colfax Shaft'; he was sinking it for a ledge; he was doing the work in connection with the Colfax location, and for that claim. When, therefore, he spoke of the Colfax lode, could any body doubt what lode he meant? Is it not apparent that he meant that lode on which or for which he was sinking? If there could be any doubt of his meaning, is not that doubt resolved by the fact that Drake immediately went into possession of that lode, and that

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Blasdel acquiesced in that possession and that of his grantees for nearly two years? It seems to me that the case is too plain to be better illustrated than by its bare statement. But for the fact that counsel have so strenuously argued and that a jury has found to the contrary, I should have thought no elaboration of the view I have taken necessary.

"Much testimony was introduced as to the character of the ground between the Montrose location and the solid ledge, and also as to that between the top of the Colfax shaft and the 'lady's chamber.' The testimony of the defendant's witnesses was, that there was no ore connection between the location monuments and the ore chambers nearest to them. The plaintiff's witnesses swore to a vein connection—a connection in vein matter. The witnesses all agree that the vein matter of the district is broken lime, spar, and quartz mixed; that lime and spar are found mixed with the richest ore and often in considerable quantities; in other words, that portions of ledges, sometimes greater, sometimes less in extent, are barren. It is not, however, a very material question whether there is an ore connection or not between the surface where the Colfax notice was posted and the ore chambers beneath. In order to hold a ledge, it is not necessary that the notice should be placed on the ore or any part of the vein or lode. It is sufficient, as the jury was instructed, if the notice is placed in such reasonable proximity and relation to the ledge, as in connection with the work done under it to give notice to all comers what ledge is intended. Here is the case of a ledge, deep in the ground, not appearing at the surface in the shape of solid ore, but only in vein matter. There is, on the surface, broken lime, spar, debris, mixed with small quantities (occasional bunches) of ore. This was deemed by the locators of the Ward Beecher and Colfax, and the event proves with reason, a good indication of a ledge beneath—if not a ledge itself. They made their locations on these croppings and sank shafts for the ledges. Can any court go to the length of holding that the notices

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and the work did not give reasonable notice as to what ground was claimed? If it could be so held, what would become of the Ward Beecher claim itself? * * * * * These views, if correct, are in my opinion conclusive. * * * * * I think a new trial ought to be granted, and it is so ordered.

W. H. BEATTY, D. J."

To show that this order should be affirmed, I think but little need or can be added to the foregoing very able and perspicuous statement. The correctness of its exposition of the facts and testimony is not assailed; but it is argued "that the question is here—as it was below—is the evidence insufficient *in law*; that it is error to grant a new trial upon the ground of insufficiency of the evidence, where there is a substantial conflict of testimony, for the jury and not the court must respond to questions of fact." I do not so understand the law. By a rule almost coeval with the maxim quoted—certainly one as deeply rooted in the law—the *nisi prius* judge has jurisdiction, on motion for a new trial, to decide, as a question of fact, whether the scale of evidence which leans against the verdict very strongly preponderates. 3 Black. Com. 392. It is not enough to authorize the appellate court to reverse such decision, that the evidence appears fully to support the verdict. It will only be reversed for the most cogent reasons, such as a conclusive preponderance of evidence in favor of the verdict. 21 Cal. 414; 21 Iowa, 337.

I understand the counsel for the appellant to contend for such a preponderance on one point only, viz: the intention to take the Ward Beecher ledge by the Colfax location. This intention, it is argued, is conclusively negated by the circumstances, that the Colfax recognizes the Ward Beecher location and is parallel to it and that the locators claim the discovery of a ledge. If these circumstances are conclusive of any thing, it is that the locators of the Colfax believed it to be a newly-discovered and unappropriated vein—not of the absence of an intention to locate it in consequence of such belief. In fact, Sproul swears that the Colfax was

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located for the protection of the Ward Beecher and was located and worked under the impression that they were one and the same. There is nothing in the fact that a discovery claim was taken by Hart and Harps to conclusively impeach this statement of Sproul. The Colfax notice reads:

“COLFAX LODE.

“We, the undersigned, claim 1000 feet on this lode, 600 ft. south, 400 ft. north from this monument.

“South.

North.

“H. Harps, 300.

L. Barris, 200.

“L. J. Hart, 300.

E. R. Sproul, 200.”

Barris and Sproul did not become tenants in common with Hart and Harps of the whole one thousand feet. They attempted to acquire a segregated claim of four hundred feet running north. Their title to this could not be vitiated by reason of any excess in the number of feet claimed by Hart and Harps. Barris and Sproul took up just the number of feet they had a right to take on the hypothesis that they were making a relocation.

In favor of the order, we must assume every fact which the district judge finds a clear preponderance of evidence for and which we cannot find a clear preponderance against. We must, therefore, assume, at least, that the Colfax notice was posted within a few feet of the shaft upon which the first work was done under it; that before the deed in question was executed, this shaft had been sunk ten or twelve feet and a drift run in the ledge; that, from the very top of it, it was within the walls of the ledge or the lateral boundaries of the deposit, and that this work was done for the purpose of holding this ledge. Upon this assumption of fact, we cannot say, as an inference of law, that this was not a location—in fact and in intention—of the 300 feet of the ledge in dispute, lying next south from the Ward Beecher location monument; that the title so acquired would not have sustained an ejectment against a subsequent appropriation of even date with said deed, and a recovery thereby of that 300 feet of this very ledge, as and because it was the Colfax

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ledge; nor that said 300 feet would not pass by conveyance as part of the same. There is no law to prevent a party from relocating his own claim by a different name; and if he does so and then conveys it by the latter name, I can see no reason why the existence of the former location should invalidate the deed. Of course, he can not thus acquire title to more ground than the law allows him to locate. But that which he had a right to relocate would pass by the deed, notwithstanding the nullity of the relocation to the extent of the excess. However, it is only necessary in this case to affirm the ruling that, by the Colfax location, this ledge acquired a name and description by which it could be conveyed.

The deed from Roberts to Phillipotts, for and in consideration of fifty thousand dollars in hand paid, grants, bargains, sells, remises, releases, conveys, and quitclaims the premises described, to have and to hold to said Phillipotts, for use and benefit of the Eberhardt and Aurora Mining Company. It is contended that the legal title vested in said company and that, therefore, the action should have been prosecuted in its name. The argument is that, having adopted the common law, the English statute of uses, passed before the colonization of America, is here in force and by it the use was executed. The position that the statute of uses is part of our law is supported by an imposing array of authority; but, if this is to be considered as a deed of bargain and sale, it is clear that the legal title remained in Phillipotts. In the language of Blackstone, no use can be limited on a use, and when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant and therefore void; but, though not a use which the statute can execute, yet still it is a trust in equity, which in conscience ought to be performed. 3 Com. 336; 5 Wallace, 282; 17 Cal. 44.

The rules laid down in respect of the construction of deeds, says Lord Mansfield, are founded in law, reason, and common sense that they shall operate according to the

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intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which, by law, will effectuate the intention. If this had been simply a feoffment with livery, or a release to one already clothed with an estate in possession, it may be that the company would have taken the legal title, even in opposition to the intention of the parties, on the principle that the will of the subject cannot control the express enactment of the legislature. But if our statutes have not rendered livery of seizin and possession in the releasee unnecessary to the respective efficacy of a feoffment and release, it is clear that we should construe this deed to be a bargain and sale, because in that way alone it can then have the operation intended, or any operation.

In some of the states statutes have been passed providing in terms that the feoffee shall be seized without livery and the releasee without possession, but I can find no such or equivalent provision in the statutes of this State. And on the supposition that the statute of uses is here in force, no inconvenience can result from the absence of such enactments. For a feoffment without livery or a quitclaim to one not in possession would still pass the legal title, by raising a use, which the statute at once executes. 2 Smith's Leading Cases, 521. I am satisfied that this is the correct view, and that this is to be treated as a deed of bargain and sale, which by force of the statute of uses conveys the legal title to Phillpotts in trust for the company—a trust cognizable only in a court of equity.

But even if it can be held that the provision in our statutes for the recording of deeds dispenses with the common law requisite of livery of seizin and that the recording of a deed takes the place of livery and is equivalent to it, there is still sufficient authority that this action was well brought in the name of Phillpotts as the proper party plaintiff. For we would then have, as stated in *Matthews v. Ward*, *infra*, a deed capable of transferring the estate either as a feoffment, release, or bargain and sale—the operative words of each species of conveyance being used. The question then would be,

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not whether, if it can not operate in one way, it shall in another; but what is the character of the deed in point of law? The intention of the parties was, undoubtedly, to vest the legal title in Phillpotts, otherwise the conveyance would have been made directly to the corporation. By law it may operate as a bargain and sale, and so to construe it will most effectually accomplish the intention of the parties. And such construction does no violence to the language used, which expresses an intention to convey the estate by means of a bargain and sale; or, as laid down in Smith's Leading Cases, the deed may be regarded either as a statutory grant, or as deriving its effect from the common law or the statute of uses, as will best subserve the object for which it was executed. *Mattheus v. Ward's Lessee*, 10 G. & J. 448; *Guest v. Furley*, 19 Mo. 157.

According to Blackstone, the only service to which the statute of uses was consigned in England at the time of the colonization of this country, was in giving efficacy to certain species of conveyances; and that service we allow it to perform here, by acting once on this deed and executing the use created by it into a legal estate in Phillpotts.

I think the order appealed from should be affirmed.

JOSEPH FULTON, RESPONDENT, v. H. N. DAY *et als.*,
APPELLANTS.

JUDGMENT TO BE AFFIRMED UPON NEGLECT TO ARGUE APPEAL. If a motion for new trial is not argued and on appeal no attention given to the case by appellant, the judgment will be affirmed without examination of the record.

ACTION AGAINST LESSEES FOR LABOR—WHEN LEASES RELEVANT EVIDENCE. Where a person sued for labor performed at a quartz mill for an association of lessees thereof: *Held*, that the leases and contract under which the lessees prosecuted the work were relevant evidence to show the character of the association and establish their interest in the labor on which plaintiff was employed.

PRACTICE ACT, SEC. 379—MEANING OF "REPRESENTATIVE OF DECEASED PERSON." Where a person was employed by another to work at a quartz mill for an association, to whom such latter person had assigned a lease thereof; and after the

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death of the assignor, the employee sued the association for work and labor : *Held*, that none of the association was sued as the representative of deceased, and there was nothing in section 379 of the Practice Act to prevent plaintiff from testifying as to the conversation and employment by deceased.

EVIDENCE PROPERLY ADMITTED IF PERTINENT FOR ANY PURPOSE. In an action against a number of persons for work and labor performed at the request of one of them, supposed to be the agent of all, where a letter and telegrams of such person directing the employment were admitted in evidence against the sole objection that no power was shown in him to bind the others : *Held*, that the evidence was pertinent at least to bind *him* and properly admitted.

INSTRUCTION ON POINT NOT IN EVIDENCE PROPERLY REFUSED. An instruction, based upon an assumption of fact not sustained by any proof whatever, is properly refused ; for the reason that no instruction can be properly given when there is no evidence to point or sustain it.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

This was an action against H. N. Day and others, alleged to be associated and doing business in White Pine County under the firm name and style of "Lessees of the Monte Christo Gold and Silver Mining Company," to recover \$748 50 for work and labor performed for them, as superintendent of their quartz mill, at their request, from August 13 to December 5, 1870. Defendants answered to the effect that plaintiff ought not maintain the action for the reason that he was one of the said lessees; that at any rate they were not indebted to him in any sum greater than \$139 86; and setting up a counter claim for boarding exceeding that amount.

On the trial plaintiff introduced in evidence, against defendants' objections on the ground of irrelevancy, three instruments marked respectively "A," "B," and "C." They consisted of a lease from the Monte Christo Gold and Silver Mining Company to H. N. Day for himself and associates, assignees of Thomas Day, deceased, of the quartz mill belonging to the company at White Pine for five years in addition to the time it had already been rented to their assignor; the original lease for five years to Thomas Day, and an agreement between the company, H. N. Day for himself and associates, and Charles Parker, recognizing the leases and providing for the carrying on of work at the mill on behalf of the

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defendants. The plaintiff then took the stand as a witness on his own behalf and testified that he had been employed by Thomas Day in his lifetime for the lessees to take charge of and superintend their works. Defendants objected to testimony of any conversations or employment by Thomas Day, on the ground that he was deceased. The objection was overruled and defendants excepted. The plaintiff proceeded to testify that he worked at the mill up to and after the time of Thomas Day's death, and that after such death he received from H. N. Day at New Haven, Connecticut, two telegraphic dispatches and a letter, which were produced and introduced in evidence, directing him to prosecute the work and keep the mill going. Defendants objected to this evidence on the ground that it did not appear that H. N. Day had any authority to bind the lessees. The objection was overruled and defendants excepted.

On submission of the case to the jury, defendants asked for an instruction based upon the supposition that plaintiff became one of the lessees by the payment of assessments as such. The instruction was refused on the ground that there was no proof of any payment of assessments. The jury returned a verdict in favor of plaintiff for \$706 50 with interest thereon; and a judgment having been entered in accordance therewith and a motion for a new trial having been overruled, defendants appealed from the judgment and order.

There were no briefs filed and no oral argument had either on the motion for new trial or on appeal.

By the Court, LEWIS, C. J.:

The motion for new trial in this case was not argued in the court below, nor has any attention been given it by appellants in this court; we are therefore not informed as to the exact points relied on, and hereafter, under like circumstances, will not consider it our duty to look into the record, but will affirm the judgment without examination. This we

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have examined, however, but find that all the assignments of error seem to be entirely without merit—the first being that the jury gave the plaintiff excessive damages, under the influence either of passion or prejudice. But the evidence fully warrants the amount awarded by the jury.

The court properly admitted exhibits A, B, and C, for they show the character of the association which was composed of the defendants, and establish their interest in the mill in which the plaintiff was employed, and thus tended, at least, to make out a *prima facie* case of liability against the defendants. They served a further purpose also—that of showing the authority of H. N. Day to employ the plaintiff on behalf of the defendants. The objection that they were irrelevant was therefore not well taken.

We cannot see how the death of Thomas Day affected the plaintiff's right to testify as to the conversation which occurred between them, provided the testimony was in other respects unobjectionable. The Practice Act of this State, section 376, provides that all persons may be witnesses in any action or proceeding except as provided in certain subsequent sections, among which is section 379, which declares: "No person shall be allowed to testify under the provisions of section three hundred and seventy-seven, when the other party to the transaction or opposite party in the action or the party for whose immediate benefit the action or proceeding is prosecuted or defended is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person; and nothing contained in said section shall affect the laws in relation to attestation of any instrument required to be attested." It was under this section that the objection appears to have been made. But it is manifest this case does not come within its provisions, for none of the defendants is sued as the representative of Thomas Day.

Nor did the court err in admitting exhibits 1, 2, and 3, which were telegrams and letters from H. N. Day, instructing the plaintiff to continue his employment. These were entirely pertinent; if for no other purpose, at least for that

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of establishing the liability of Day, who is one of the defendants in the action.

The instruction asked by the defendants and refused by the court was properly refused because based upon an assumption of fact not sustained by any proof whatever. No instruction can be properly given where there is no evidence to point or sustain it.

The judgment below must be affirmed.

GARBER, J., did not participate in the foregoing decision.

J. F. PEACOCK, RELATOR, v. JOSEPH LEONARD.

JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE'S COURT. A district court on appeal has exactly the same jurisdiction as the justice of the peace from whose court the appeal is taken.

JURISDICTION OF ACTION OF FORCIBLE ENTRY AND DETAINER. An action for "wrongfully, unlawfully, and forcibly breaking and entering into real estate and unlawfully and forcibly ousting the possessor and ever since said forcible ouster unlawfully and forcibly holding possession thereof," is an action of forcible entry and unlawful detainer within the meaning of the constitution, (Art. VI, Sec. 6) and not within the jurisdiction of a justice of the peace.

GRAVAMEN OF COMPLAINT CHARGING "FORCIBLE AND UNLAWFUL ENTRY." In an action for "wrongfully, unlawfully, and forcibly breaking and entering into real estate and ousting the possessor and unlawfully and forcibly holding possession thereof," the gravamen of the complaint is the forcible entry alleged; for the reason that although the epithet "unlawfully" is also annexed to the entry charged, it cannot be treated as a substantive cause of action distinct from the forcible entry.

NO OFFENSE OF "UNLAWFUL" AS DISTINCT FROM "FORCIBLE ENTRY." Our statutes do not provide for or create any such offense as an "unlawful" as distinguished from a "forcible entry," within the meaning of the term "unlawful" as employed in the constitutional grant of jurisdiction. (Art. VI, Sec. 8.)

GIST OF ACTION FOR "FORCIBLE ENTRY AND UNLAWFUL DETAINER." In a complaint charging a forcible entry and unlawful detainer, the gist of the action is the forcible entry, the detainer not being stated as an independent ground of relief, but as a mere continuation or consequence of the entry.

JUDGMENT ON APPEAL FROM JUSTICE FOR FORCIBLE ENTRY ANNULLED. As a justice of the peace has no jurisdiction of an action of forcible entry, a district court has no jurisdiction thereof on appeal; and its proceedings and judgment to the contrary will be annulled on *certiorari*.

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This was a proceeding on a writ of *certiorari*, issued out of the Supreme Court to the clerk of the district court of the second judicial district in and for Washoe County and directing him to certify up the proceedings in that court in the case of *Joseph Leonard v. J. F. Peacock*. On the return made, it appeared that action was originally commenced before J. S. Bowker, justice of the peace, for the purpose of recovering possession of a certain house and lot in the town of Reno, and damages. The allegations of the complaint and the proceedings before the justice, and on appeal before the district court, are stated in the opinion. The writ of *certiorari* was issued at the instance and on the petition of Peacock.

Haydon & Cain, for Petitioner.

It is clear, from Art. VI, Sec. 6; of the constitution, that the district court has original jurisdiction in an action of forcible entry and unlawful detainer, and that the proceedings of a justice of the peace in such an action are without authority of law and void. *Armstrong v. Paul*, 1 Nev. 138; *Hoopes v. Meyer*, 1 Nev. 440. We must, therefore, strike from the pleadings all that portion which relates to a forcible entry and unlawful detainer, leaving the only questions to be tried that of an unlawful entry and forcible detainer; and the first point to consider is, what court has jurisdiction over such causes of action, and can a justice of the peace try them?

The constitution, in providing for the jurisdiction of justices of the peace, after enumerating several causes of action, says (Art. VI, Sec. 8): "Also of actions for the possession of lands and tenements where the relation of landlord and tenant exists, or where such possession has been unlawfully or fraudulently obtained or withheld." The statute gives justices of the peace the same jurisdiction. Stats. 1869, 272, Sec. 509. Neither the constitution nor the statute give justices' courts jurisdiction in actions concerning a forcible detainer; and as these courts are courts of

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limited jurisdiction, they can take cognizance only of such causes as the law has marked out for them, and can not take any jurisdiction by implication. It follows that the district court alone can try those cases wherein it is alleged that a party has been guilty of a forcible detainer. Striking, therefore, from the complaint all that relates to a forcible entry and unlawful detainer and a forcible entry and forcible detainer, there is nothing left of the complaint except the charge that defendant unlawfully entered upon and took possession of the premises and retains the same.

But the act concerning forcible entries, (Stats. 1864-5, 180) is silent as to what constitutes an unlawful entry. No mention is made thereof in any of the sections of that statute. The only offense is an unlawful detainer, and, as has already been seen, the constitution has given jurisdiction of such cases to the district court, and to the justice's court only where the relation of landlord and tenant exist, which is not claimed to be the case here; and perhaps one other case where a person found in possession of premises and not a tenant of the landlord thereof shall be deemed guilty of an unlawful detainer, if he does not deliver up such premises to the landlord thereof after a written demand by said landlord. An unlawful entry is a peaceable entry in bad faith, and in an action therefor the defendant is entitled to show that he entered in a peaceable manner and in good faith and under a claim and color of title; and this is a good and sufficient defense to him; but this he is not allowed to show in an action of a forcible entry; for the preservation of the peace is of a higher consideration than a private right. *Thompson v. Smith*, 28 Cal. 531; *Wilby v. Houston*, 38 Cal. 422. In order to enable him to show his right of possession and claim of title, the action must be commenced in the district court in the exercise of original jurisdiction, and can not be tried in the exercise of appellate jurisdiction; and if the supreme court find upon a writ of *certiorari* that the justice of the peace did not have jurisdiction, the fact that the cause was appealed to the district court will not cure it, and the proceedings will be annulled. *Will v.*

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Sinkwitch, 39 Cal. 571; *Caulfield v. Stevens*, 28 Cal. 118; *McEvoy v. Tye*, 27 Cal. 375.

I. B. Marshall, for Respondent.

I. The constitution (Art. VI, Sec. 6) provides that the district court shall have original jurisdiction of the actions of forcible entry and unlawful detainer, while it also (Art. VI, Sec. 8) provides that the legislature may confer upon justices' courts jurisdiction concurrent with the district courts of actions for the possession of lands and tenements, where the relation of landlord and tenant exists, or where such possession has been unlawfully or fraudulently obtained or withheld. The Practice Act, Sec. 509, provides that justices' courts shall have jurisdiction of actions where the possession of lands or tenements has been unlawfully or fraudulently obtained or withheld, in which case the proceedings shall be as prescribed by the act upon that subject. The grant of original jurisdiction in the constitution to a particular court of a class of cases without any words excluding other courts from exercising jurisdiction in the same cases, does not deprive other courts of concurrent jurisdiction in such cases. *Courtwright v. Bear River and A. W. and M. Co.*, 30 Cal. 573.

II. If a party, sued before a justice, has a good defense to the action in equity, he can appeal to the district court and there interpose his equities by way of answer, just as he would have the right to do, were the action originally commenced in that court. *Fowler v. Atkinson*, 6 Minn. 503.

III. Forcible entry and forcible detainer are separate causes of action and ought to be separately stated in different counts in the complaint; but if the complaint is not demurred to, the objection is waived. *Valencia v. Couch*, 32 Cal. 340.

By the Court, GARBER, J. :

Leonard sued Peacock in a justice's court. The complaint alleged that, on a certain day, Leonard was in the peaceable

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possession of certain real estate, and that so being, Peacock "wrongfully, unlawfully, and forcibly broke and entered into the same, and unlawfully and forcibly ousted Leonard, and has, ever since said forcible ouster, unlawfully and forcibly held possession," etc. Leonard obtained a judgment, and Peacock appealed to the district court. In the district court, the jury found a verdict of guilty, and assessed the damages at ten dollars, and thereupon judgment was rendered in favor of Leonard for the possession of the premises, treble damages, and costs. To annul that judgment, Peacock has made this application for a writ of *certiorari*.

As the district court on appeal had exactly the same jurisdiction as the justice of the peace, the question is whether this was an action of "forcible entry and unlawful detainer," or an action "for the possession of lands and tenements, where the relation of landlord and tenant exists, or when such possession has been unlawfully or fraudulently obtained or withheld," as provided for in the constitution of this State. I think it must be regarded as the former, and that consequently the whole proceeding was void. The gravamen of the complaint is the forcible entry alleged. Though the complaint also annexes the epithet unlawfully to the entry charged, this can not be treated as the statement of a substantive cause of action, distinct from the forcible entry; for our statutes have provided for or created no such offense as an unlawful as distinguished from a forcible entry. In one sense, however, every forcible entry is unlawful, but not unlawful according to the meaning of that term as employed in the constitutional grant of jurisdiction. The complaint must then be taken to charge simply a forcible entry and unnecessarily to assert the conclusion that it was also unlawful because forcible. The same may be said of the allegation that the detainer was unlawful. "In a complaint so framed, the forcible entry is the gist of the action"—the detainer not being stated as an independent ground of relief, but as a mere continuation or consequence of the entry.

31 Cal. 126.

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'The judgment, too, proceeds on the same theory—treble damages being authorized only on the hypothesis that this was an action for and recovery based upon a forcible entry or a forcible holding.

The record shows that the district court as well as that of the justice exceeded their jurisdiction. Certainly it fails to show their jurisdiction clearly and affirmatively. I am of opinion, therefore, that the proceedings and judgment under review should be annulled.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

JULY TERM, 1872.

AARON D. TREADWAY, RESPONDENT, *v.* JONAS
WILDER, APPELLANT.

OBJECTIONS TO DEFECTIVE PLEADING—WHEN AND HOW TO BE TAKEN. Where a party relying upon a pre-emption right pleaded the facts giving such right so defectively that a demurrer to it would clearly have been sustained; but the opposite party, instead of demurring, made up an issue as of fact on such pleading, and on the trial objected to proof of the facts on the ground of insufficiency of the plea: *Held*, that the practice of making up an issue as of fact in this way and then attempting to take advantage of the unwary pleader, by motion or objection on the trial, was reprehensible, and that the exclusion of the evidence offered under such circumstances was error.

TECHNICAL DEFECTS OF PLEADING—OPPORTUNITY TO AMEND TO BE AFFORDED—SPIRIT OF THE CODE. When a pleading contains a defective statement of a cause of action, as distinguished from a statement of a defective cause of action, the defect, if relied on by the opposite party, should be pointed out by demurrer so as to afford an opportunity to amend—neither the spirit of the code nor properly speaking its practice allowing a substantial right to be cut off by a mere technical judgment without giving such an opportunity.

CONTRACTS BETWEEN PRE-EMPTIONERS—RULE IN ROSE *v.* TREADWAY, 4 NEV. 455. The rule announced in *Rose v. Treadway*, 4 Nev. 455—to the effect that a contract, by which one party entitled to pre-empt certain land agrees to make no claim in consideration of which the other party agrees to pre-empt a larger tract and after obtaining title to convey the smaller tract to the first party, is neither in contravention of the pre-emption laws nor within the statute of frauds—may be considered to have become a rule of property in this State.

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EFFECT OF DEED UNDER CONGRESSIONAL TOWN-SITE ACT. It seems that a deed made by a trustee purporting to act under the law of congress of May 23, 1844, providing for the disposition of town-sites to the occupants is not conclusive in its effect: and if given to one not an occupant or having the right of occupancy as contemplated, that fact may be shown and the deed in such case will fall, as absolutely void and of no effect.

DEFENSE TO EJECTMENT ON TOWN-SITE TRUSTEE'S DEED. Though an occupant of a town lot, by neglecting to present his claim in accordance with the statute relating to town-sites, may be barred of the "right of claiming or recovering such land or any interest or estate therein." (Stats. 1866, 54, Sec. 4) there is nothing to prevent him from showing, in defense to an ejectment by a person who procures a deed, that such plaintiff has no title and from thus protecting his possession.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action of ejectment for a lot of about four acres of land on Minnesota Street in Carson City. The cause was tried before a jury, which rendered a general verdict for plaintiff and a special verdict that defendant by himself and tenants had been in the possession and occupancy of the land ever since May 10, 1866—which appears to have been the date of the patent of the United States to Judge S. H. Wright, as trustee for the town-site of Carson City. The facts more especially bearing upon the points decided are stated in the opinion.

There having been a judgment for plaintiff, the defendant appealed.

T. W. W. Davies, for Appellant.

I. Defendant proved that he and his grantors had been in the occupancy and possession of the land described in the complaint since 1859; and that since 1861 he had continuously resided on it with his family, having his dwelling-house thereon and cultivating the ground. He then offered to prove that a portion of the land described in the complaint was embraced in a forty acre tract, partly occupied by himself and partly by plaintiff; that he and plaintiff, each having the qualifications of pre-emptioners, entered into an agreement by which defendant was to suffer plaintiff to pre-empt, who, in consideration of the defendant's desisting

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from contesting his right, was after obtaining the title to deed to defendant so much of said forty acres as was situated within his enclosure upon the payment of a proportional part of the expenses. The plaintiff objected to the introduction of any testimony as to the verbal contract on the ground that, if entered into, it was in contravention of the pre-emption laws and within the statute of frauds. The court below excluded the testimony and in doing so, as we contend, committed error.

The relinquishment of his right of pre-emption, the forbearing to put plaintiff to the expense of a contest in the land office, and the promise to pay money, very far remove the contract from the *nudum pactum* contended for by plaintiff. *Lohler v. Folsom*, 1 Cal. 207; *Stafford v. Lick*, 7 Cal. 490; 13 Wis. 321; 16 Wis. 140; 16 Wis. 202; 27 Ill. 93. The statute of frauds will never, in equity, be allowed to operate as a protection to fraud; and for the purpose of showing that a fraud had been committed, or is being attempted, parol evidence will be admitted, even against the words of the statute. *Hidden v. Jordan*, 21 Cal. 92.

As to the pre-emption laws, no act of congress was violated by such agreement. When, by an agreement between settlers, each secures the precise lands that he has occupied, cultivated, and improved, the object of the pre-emption laws of congress is attained; and if, under such agreement, one acquires the legal title for another's land, a trust results which a court of equity will enforce. *Rose v. Treadway*, 4 Nev. 459; *McCoy v. Hughes*, 1 Iowa, (Greene) 371; *Brooks v. Ellis*, 3 Iowa, (Greene) 258; *Snow v. Flannery*, 10 Iowa, 318; *Fischer v. Morlick*, 13 Wis. 321; *Stephenson v. Smith*, 7 Mo. 619; *Groves's Heirs v. Fulsome et al.*, 16 Mo. 549; *Douglas v. Wiley*, 15 Ill. 576; *Franklin v. McFlynn*, 23 Ill. 91.

II. The court below erred in awarding the land described in the deed of S. H. Wright to A. D. Treadway to plaintiff, the proof being that at the time of the execution of said deed (January 9, 1867) defendant was occupying it, residing in a dwelling-house thereon with his family, having the same enclosed by a substantial fence under cultivation and

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with improvements thereon worth \$3000; and that plaintiff had no interest in nor claim upon said land, had never owned or occupied the same or any part thereof, and was never authorized by the defendant, the occupant, to purchase said land from the trustee, S. H. Wright. The act of congress under which that deed purports to derive its efficacy provides that the entry of town-sites shall be "in trust for the several use and benefit of the *occupants* thereof, according to their respective interests." The law recognizes no other proprietors except actual occupants; and the land department at Washington will not recognize or protect claims or interests of any other persons than occupants. 1 Lester L. L., 441, 436, 737; 2 Lester L. L., 312. The act of congress itself provides that any act of the trustees not made in conformity to the rules and regulations shall be void and of none effect. 5 U. S. Stats. at Large, 567. The deed to plaintiff was therefore not issued in conformity to law, was a fraud upon the rights of the public and of defendant in disposing of said land without offering it for sale to the highest bidder; and under the act of congress it was "void and of none effect."

III. The action of ejectment is a possessory action. It was shown by the evidence that the defendant has been in the possession of the land since 1859, and he is now entitled at least to the possession. Brief of Ellis & Sawyer, Point III, *Rose v. Treadway*, 4 Nev. 456.

Ellis & King, for Respondent.

I. The answer does not set up any valid defense to the action. It fails to allege that defendant was in a position and possessed the requisite qualifications, at the time of the alleged contract, to pre-empt the land. Unless he was a qualified pre-emptioner under the law of 1841, he was not in a position to exact from, or take advantage of, any promise of plaintiff to convey after patent.

II. The statute of frauds clearly applied unless a trust was raised by implication at law. But as the defendant was

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not qualified as a pre-emptioner, he has not been placed in any worse position by the failure of plaintiff to convey than he would have been had plaintiff not agreed to convey. The contract was entirely a *nudum pactum*, utterly without consideration, unless defendant was not only a qualified pre-emptioner but so situated with reference to the land in question that he could pre-empt it.

III. As neither ultimate nor probative facts were stated in the answer, there was no error in excluding the proffered testimony, especially when the proffer fell short of the answer.

IV. As to the deed from Judge Wright, our position is that as defendant failed to present his statement in writing to the district judge, he is barred from asserting any claim to the land, in virtue of his occupancy, that fact alone not giving him the right to the deed. Stats. 1866, 54, Sec. 4. The deed is conclusive unless obtained by fraud, and of that there is no allegation.

By the Court, WHITMAN, J.:

To respondent's complaint, in an action for the recovery of real property, appellant pleaded, or attempted to plead, an equitable defense and prayed equitable relief. The respondent relied upon two muniments of title for recovery. For a portion of the land, (what portion is not shown by the transcript,) he presented a patent from the United States; for the residue, a deed made by Judge S. H. Wright, acting as trustee under a statute of this State purporting to be passed in accordance with the "act for the relief of citizens of towns upon lands of the United States, under certain circumstances," approved May 23, 1844.

With regard to the patent appellant pleaded thus: "Defendant further answering avers that the balance of said tract of land was, at the time it was purchased and first occupied by the defendant, government land of the United States, and that on the — day of — 1866, said plaintiff wrongfully and unlawfully pre-empted the tract of land,

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including the premises described in the complaint, and has wrongfully and unlawfully received a patent from the government of the United States for the same. That at the time said plaintiff made the application to pre-empt said tract of land, said defendant was residing upon and had the improvements upon and was cultivating the tract of land described in the complaint as aforesaid; and that the same was pre-empted against the right and interest of this defendant. Defendant avers that prior to and since the pre-emption of said tract of land by plaintiff as aforesaid, said plaintiff, for and in consideration of the rights of the defendant in and to the same, promised and agreed, upon the obtaining of the patent from the government of the United States, to deed to the said defendant that portion of said land described in the complaint, upon the payment by the defendant what the same cost, to wit: one dollar and twenty-five cents per acre; and for the further consideration for the deed from plaintiff to the defendant, that the defendant would not contest with the plaintiff the right to pre-empt said tract of land—the defendant, under the law of the United States, having the legal right to pre-empt the same. And for the agreement and promises as aforesaid, the defendant did not contest with said plaintiff for the pre-emption right to the same, but allowed the plaintiff to pre-empt the same. Defendant further avers that on or about the 28th day of March, A.D. 1870, he tendered to the said plaintiff twenty dollars in gold coin of the United States, and demanded of the plaintiff a deed for the tract of land as described in the complaint, and that said plaintiff did then and has ever since and does now neglect and refuse to deed to the defendant said tract of land; said sum of twenty dollars being more than sufficient to pay for said land and all expense of making deed to the same; that said money tendered as aforesaid has always been ready for said plaintiff and is brought into court to be paid to the said plaintiff upon the making of the deed as aforesaid."

Evidence was offered in support of this plea, which upon objection of respondent was excluded. The plea is alleged

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to be insufficient, because it does not state the facts which it would be necessary to prove to constitute one a pre-emptioner.

It has been held in California that one who relies upon a pre-emption must plead the facts giving the right. *People v. Jackson et al.*, 24 Cal. 630; but this was after demurrer and refusal to amend. This court has reprobated the practice of making up issues as if of fact, and then attempting to take the advantage of the unwary pleader by motion or objection on trial. *Cal. State Tel. Co. v. Patterson*, 1 Nev. 151.

This case comes fairly within the reason of that last cited, admitting the pleading to be radically defective; but it will be seen upon comparison to differ from the California case in this, that here some of the constituent facts underlying the right to pre-empt are stated; *i. e.*, residence and improvement; so it falls within the rule governing what is called a defective statement of a cause of action, as distinguished from a statement of a defective cause of action. There is in the portion of the pleading before quoted, an attempt to set up a cause of action, which if properly pleaded and proven might have entitled the appellant to the relief claimed. Upon demurrer the pleading would have been held bad, but the defect pointed out could have been remedied by amendment. No such opportunity was given, and a technical judgment may have cut off a substantial right; such is not the spirit of the code, nor, when properly interpreted, its practice. *Masten et al. v. Marlow et al.*, 65 N. C. 696; *White v. Spencer*, 14 N. Y. 247; *Brown v. Richardson*, 20 N. Y. 472; *Oliver v. Depew*, 14 Iowa, 490.

The evidence offered should have been received unless objectionable otherwise; and this brings up the second objection thereto, that it tended to sustain a contract within the statute of frauds and opposed to federal legislation. As to the latter proposition, the contrary has been held in this State and may properly be considered to have become a rule of property, of which it should be said *stet.* *Rose v. Treadway*, 4 Nev. 455. Upon either point or both, the weight of authority is against respondent. *Hidden v. Jordan*,

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21 Cal. 92; *McCoy v. Hughes*, 1 Iowa, (Greene) 371; *Brooks v. Ellis*, 3 Iowa, (Greene) 258; *Snow v. Flannery*, 10 Iowa, 318; *Fischer v. Morlick*, 13 Wis. 321; *Stephenson v. Smith*, 7 Mo. 619; *Groves's Heirs v. Fulsome et al.*, 16 Mo. 549.

With reference to the error assigned, or rather attempted to be assigned, to the action of the court upon the other branch of respondent's title, nothing authoritative can be decided, because the record does not properly present the question; but as the case will probably be retried, it may not be amiss to say that it would seem that the deed of the trustee is not conclusive. If not given to an occupant or one having the right of occupancy, that fact may be shown; and then the deed falls, as absolutely "void and of no effect." The federal statute of 1844, under which the trustee purports to have acted in this instance, provides for the disposition of town-sites to "occupants" by a trustee or trustees acting under rules to be established by the proper legislature; also, "that any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect."

The statute containing the rules and regulations applicable here says that the property shall be deeded by lot, block, share, or parcel "to the person or persons who shall have, possess, or be entitled to the possession or occupancy thereof, according to his, her, or their several and respective right or interest in the same, as they existed in law or equity at the time of such entry of such lands, or to his, her, or their heirs or assigns." Stats. 1866, p. 54, Sec. 2. It is further ordered that lands not so deeded shall be sold at public auction, and the proceeds devoted to certain purposes. If, then, respondent was neither an occupant, nor had the right of occupancy, he was not entitled to receive a deed from the trustee, and the same was "void and of none effect," as having been made contrary to the rules and regulations by the legislature established. This the appellant would have the right to prove; though not to put title in himself as the real occupant entitled to the deed of the trustee, for he is barred of all right by section fourth of

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the act, he having presented no statement of claim within the specified time; the act, as to such neglect, reading, "and all persons failing to sign and deliver such statement within the time specified in this section shall be forever barred the right of claiming or recovering such lands, or any interest or estate therein, or in any part, parcel, or share thereof, in any court of law or equity."

But although so barred, the proof would be competent to show that respondent has no title, in which case he must fail of recovery for the land described in the trustee's deed, as that must be had not upon the weakness of appellant's but upon the strength of his own title. He relies in this case upon strict title. If in any manner it can be shown that such has no existence, that fact inures to the protection of appellant in peaceable possession, though it may not show any affirmative right or title in him.

The judgment is reversed and the cause remanded for a new trial.

By GARBER, J., specially concurring:

I concur in the judgment and in the opinion of Judge Whitman, in so far as it maintains the admissibility of the testimony excluded. To what he has said, it may be added that the pleading was so framed as to show the nature of the particular facts intended to be proved. Consequently, the plaintiff can not say that he was surprised by a case which he could not be prepared to meet. Mitford's Ch. Pl. p. 46, (note i.); 2 Y. & J. 67; 3 Greenleaf's Ev. p. 359-60. As to the conclusiveness of the deed of Wright, trustee, I have not investigated that question.



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THE VIRGINIA AND TRUCKEE RAILROAD COMPANY, RESPONDENT, v. JOHN A. LOVEJOY, APPELLANT.

EMINENT DOMAIN—CONDEMNATION OF LAND FOR RAILROAD AFTER ORIGINAL CONSTRUCTION. The fact that a railroad has been constructed according to the surveys and maps originally filed, does not prevent it from condemning other land which may be necessary and proper for its purposes; and a petition for condemnation under such circumstances is not demurrable for setting up such construction.

REPORT OF COMMISSIONERS TO "SET FORTH THEIR PROCEEDINGS." A report of commissioners, appointed to assess the value of lands to be taken for railroad purposes as provided by law, (Stats. 1864-5, 427, Sec. 30) which fails to show that they or a majority of them met at the time and place ordered and before entering on their duties were duly sworn, as required by the law, is not sufficient; and it is error to confirm such a report.

APPRAISAL OF LAND TAKEN BY RAILROAD AFTER ORIGINAL CONSTRUCTION. It seems that when land is condemned for a railroad after its original construction, the owner is entitled to the actual market value of the property at the time of taking, without deduction for any appreciation in value caused by the previous location and construction of the road.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an application to the court below for the condemnation for railroad purposes of about one and three fifths acres of ground belonging to defendant on the east side of Carson City. The petition set forth, among other things, that the petitioning company was "actively engaged in the operation of its railroad heretofore constructed between the City of Virginia, in the County of Storey, and the City of Carson, in the County of Ormsby, State of Nevada; that the present principal termini of said railroad are said cities of Virginia and Carson and said railroad has been heretofore constructed and put in operation between said cities; that prior to the construction of the aforesaid portion of said railroad a survey thereof was completed and a map thereof made; that the line as surveyed and laid down on said map was adopted by your petitioner as the route of said railroad and the said railroad was constructed in accordance therewith, and that the map herewith filed shows

the route of said road over the premises hereinafter described, to wit: a certain tract situate in Ormsby County, State of Nevada, being the north half of the northeast quarter of section 17, Township 15 North, Range 20 East, according to the public surveys of the United States; that the following described portions of said tract are necessary to petitioner for the purpose of the construction of depots and side tracks, to wit: [describing in two small pieces the land desired]; that both of said described portions of said tract are contiguous to the main track of petitioner's railroad and are necessary and proper to petitioner for the purpose of a depot, and the said last above described portion is necessary and proper for the maintenance and construction over and across the same of a side track from said main track of petitioner's railroad, as shown upon the map herewith filed." The petition further set forth that it had been in possession of the land for several months, using it for the purposes aforesaid; that defendant claimed to be the owner; that it had failed in its endeavors to purchase the same, and prayed for the appointment of commissioners, in accordance with the statute in such case made and provided, to assess the compensation to be paid to defendant, etc.

The defendant interposed a demurrer to the petition on the ground that it appeared from said petition that the railroad mentioned therein was, before the filing of said petition, completed from its initial terminus, Virginia City in Storey County, to and beyond Carson City in Ormsby County—the present latter terminus being west of said Carson City, and the land of defendant sought to be condemned being east of and adjoining said Carson City and traversed by said completed portion of said railroad; and that the land sought to be condemned was therefore not needed and could not be used in the *construction* of said railroad.

The demurrer was overruled and the defendant then put in an answer setting up substantially the same defense chalked out in the demurrer and denying that the railroad needed the land or that its condemnation would in any respect benefit the public. Upon a hearing, the court decided

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in favor of the petitioner; appointed commissioners; and, in accordance with the statute, made an order for their first meeting at a certain time and place, to wit: "Monday next, at 10 o'clock, A. M., at the office of the clerk of this court, and that their report be filed on or before the 8th day of September, 1871."

Two of the commissioners filed a report on September 12, 1871. It recites as follows: "That we, said commissioners, in pursuance of the order of the court, held our first meeting on Monday, September 4, 1871, at the hour of ten o'clock in the forenoon of said day and at the office of the clerk of this court, and thereupon, owing to the illness of Commissioner Crawford, said meeting was duly adjourned until the following day, Tuesday, September 5, 1871, at the same hour and place; that at the time and place fixed as aforesaid, we said commissioners met, all being present, and thereupon proceeded to view the several tracts of land described in said amended petition and as ordered by the court, and thereupon adjourned the further hearing until Saturday, September 9, 1871, at 10 o'clock, A. M." The report proceeds to recite that the parties appeared before the commissioners and introduced witnesses, the substance of whose testimony is set forth; that the commissioners heard counsel; and that after due consideration and being fully advised they ascertained and assessed the compensation for the land sought to be appropriated at \$300 in gold coin. Upon this report judgment appears to have been entered.

Defendant moved for a new trial upon the records and certain affidavits setting forth, among other things, that some of the material testimony in his favor was not correctly reported by the commissioners. The motion was overruled; and defendant then appealed from the judgment and order.

Thomas Wells, for Appellant.*

I. The demurrer should have been sustained. When a railroad company files its map of its route of road, if the same then run over private lands, it must before constructing its track, side tracks, turn-outs, turn-tables, switches,

depots, machine shops, etc., ascertain just what private lands it will need for any and all of those purposes, have it condemned by commissioners, (if the price to be paid therefor can not be agreed upon) pay for and take possession of it, and then proceed with the work of construction. After a road has been constructed and put in operation, no condemnation can be made—there is no provision of law for any such proceeding. If a company, after its road has been built and put in operation, want land contiguous to it belonging to a party as private property it must obtain such land, if at all, at private sale, as any other natural or artificial person would. See 2 Ohio St. 235; 17 Ohio, 349; 1 Redf. on Law of Railways, 390, § 10; 10 Conn. 157; 12 Conn. 360.

II. There was error in overruling defendant's motion for new trial. In support of his motion defendant obtained the affidavits of two of the witnesses, showing that the testimony was not correctly reported to the court by the commission. The commission, in all such cases, must make a report "setting forth their proceedings in the premises," as required by law. (Stats. 1864-5, 427, Sec. 30.) They must not garble or misstate the evidence. If they do, how can the court or judge determine whether the award made by them is too exorbitant or too small?

W. S. Wood, for Respondent.

I. The point which defendant asks this court to consider is, in effect, that under the act authorizing the acquiring of lands for railroad purposes, a company is bound in the first instance to define all the lands it wants or may want in the future; that though its business may increase, its necessities become extended, its needs enlarged, still it must be confined to the quantity originally taken or used. There is nothing in the statute nor in any of the authorities, to justify so limited a construction, nothing which ought to induce this court to discard all ideas of progress and bind railroad companies down to a rule which would work so great a hardship and manifestly tend to obstruct the very purpose for

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which their organization is permitted. See *C. B. & Q. R. R. Co. v. Wilson*, 17 Ill. 127; 47 Maine, 35; 1 Redfield on Railways, 345; *South Carolina Railways v. Blake*, 9 Rich. 228; 18 Illinois, 324.

II. No ground exists for setting aside the award. By statute the commissioners are required to view the premises. This duty was imposed upon them for some purpose and I contend for none other than to inform them of the situation and character of the property, so that they might be enabled to make up their minds concerning the proper amount of compensation to be allowed; in other words, as has been said, to make witnesses of the commissioners themselves. *C. P. R. R. Co. v. Pearson*, 35 Cal. 261. We cannot regard the commissioners as witnesses and then suffer their judgment to be balanced or outweighed by the opinions expressed in opposing affidavits. The judgment expressed by the commissioners upon questions of value may combine the opinions of a hundred men, who are in all respects as well qualified to form just conclusions as those who make opposing affidavits.

By the Court, GABBER, J.:

The demurrer to the petition was properly overruled. *Toledo and Wabash Railway Co. v. Daniels*, 16 Ohio St. 390.

The report of the commissioners fails to show that they, or a majority of them, met at the time and place ordered, and before entering on their duties were duly sworn to honestly, faithfully, and impartially perform the duties imposed upon them. For this reason the court erred in confirming the report. *New Jersey Railroad and Transportation Company v. Suydam*, 2 Harrison, N. J. 25; *C. P. R. R. Co. v. Pearson*, 35 Cal. 258.

This dispenses with the necessity of deciding whether the affidavits in the record show good cause for setting aside the report. The safer way, however, is to set forth the evidence word for word, fully and accurately, in the report.

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And it would not be amiss, in order to guard against all complaints of the kind here made, for the commissioners to take the testimony as depositions are taken, causing each witness to sign his name thereto at the time.

The statutory provision that, in assessing the compensation, allowance shall be made for any benefit or advantage that will accrue by reason of the construction of the road, seems to be inapplicable to this case. And consequently the relevancy of some portions of the testimony may admit of question. The appellant was entitled to the actual market value of the property at the time of taking, without deduction for any appreciation in value caused by the previous location and construction of the road.

The order appealed from is reversed and the proceeding remanded for further action in the court below.

THE STATE OF NEVADA, RESPONDENT, v. THOMAS
WELLS *et als.*, APPELLANTS.

LIABILITY ON OFFICIAL BOND OF APPOINTED DISTRICT ATTORNEY. The sureties on the official bond of a person appointed to fill a vacancy in the office of district attorney, conditioned for faithful performance during incumbency, are liable for a breach at any time while such person fills the vacancy and until his successor is qualified.

TERM OF DISTRICT ATTORNEY HOLDING BY APPOINTMENT. The provision of the act of March 11, 1865, to the effect that a vacancy in the office of district attorney shall be filled by appointment for the "balance of the unexpired term," (Stats. 1864-5, 286, Sec. 16) was repealed by the general act of March 9, 1866, relating to officers, (Stats. 1866, 231) requiring all appointments to county and township offices to run "until the next general election."

APPOINTMENT NOT TO INTERFERE WITH REGULAR TERM OF OFFICER ELECTED. A reasonable construction of the act of March 9, 1866, relating to officers and providing that persons appointed to fill vacancies are to hold "until the next general election," does not contemplate that an appointment to fill a vacancy, occurring after an election but before the newly elected officers are to assume their duties, can keep out of his regular term a person legally chosen at such election.

DISTRICT ATTORNEY TO HOLD OFFICE TILL SUCCESSOR QUALIFIED. Although the statute makes no provision that a district attorney, whether elected or appointed,

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shall hold office until the qualification of a successor, yet he must do so under the general rule, because the presence of such an officer is necessary to the proper conduct of the public business.

LIABILITY ON OFFICIAL BOND OF "DE FACTO" OFFICER. The sureties on the official bond of a district attorney, conditioned for faithful performance during incumbency, are liable for his defalcations, though he hold office only *de facto* and not *de jure*.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action against Thomas Wells, former district attorney of Ormsby County, and H. S. Mason, Wm. H. Corbett, James Frazer, and Jacob Sheyer, the sureties on his official bond, to recover the sum of twenty-five hundred dollars, alleged to have been collected by said Wells as district attorney for delinquent taxes during the time he held office and converted by him to his own use. It appears that Samuel C. Denson was district attorney of Ormsby County for the term of 1867 and 1868, and at the election in November of the latter year was re-elected for the next two years. In December, 1868, Denson resigned and Wells was appointed to fill the vacancy and gave the official bond sued on.

Defendants interposed a demurrer to the complaint, which was overruled; and they then made default. The plaintiff put in testimony; and the court below found all the allegations of the complaint true, with the exception of the amount of the defalcation. In accordance with the findings there was a judgment for plaintiff in the sum of \$1692 53 and costs. The sureties appealed from the judgment.

Clarke & Lyon, for Appellants.

I. The term of the county commissioners, who made the appointment of Wells in December, 1868, expired on the day before the second term of Denson commenced; that is, on the day before the first Monday in January, 1869. They had no authority to make an appointment for a term to commence only after the expiration of their term, and in a case where the office had an incumbent "authorized to execute the duties thereof." Stats. 1866, 236; Sec. 41; 9 Mass. 231; 10 Mass. 290.

II. The sureties on the bond for the unexpired first term are not liable for any defalcation occurring after the term for which the bond was given had expired. The contract of the sureties cannot be extended by the neglect of the commissioners and the holding over of the incumbent. 8 Allen, 371; 9 Wheaton, 720; 3 Pick. 340; 7 Gray, 1; 17 Cal. 93; 5 Cal. 106; 33 Barb. 196; 7 Jones (Law) N. C. 149.

L. A. Buckner, Attorney General, for Respondent.

I. By the express conditions of the bond itself, the sureties are held for any misconduct on part of Wells "during his incumbency of said office." These words show the limitation of the bond, as well as the intention of the sureties to remain responsible and bound for his official acts during his incumbency. They are therefore responsible for any and all breaches occurring while he was such incumbent from the time he qualified on December 9, 1868, until the expiration of his incumbency on December 31, 1870.

II. With regard to point that the commissioners could not appoint for a period beyond their own term of office, it is sufficient to say that it can not arise in this case; for the record does not show when the commissioners were elected or when their term of office expired. This is an appeal from the judgment; and there is nothing in the record to show that an election was held in 1868 at which commissioners or a district attorney were elected.

No exceptions were taken to the findings, so the appellate court will not inquire into the sufficiency of the evidence, but will presume the issues of fact properly found. *O'Connor v. Stark*, 2 Cal. 153.

William Patterson, also for Respondent.

The sureties bound themselves for the faithful performance of the duties of said officer "during his incumbency in said office:" they are therefore bound for the defalcation of said officer during the whole of the time he held such office under and by virtue of said appointment. The constitution and laws of this State make it the duty of all

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officers to hold their respective offices until their successors are elected, or appointed and qualified. The statute of 1864-5, 401, Sec. 2, was passed for the express purpose to cover such cases as the one at bar, and does, without any question, make Wells and his sureties liable on the bond.

Clarke & Lyon, for Appellants, in reply.

It is alleged in the complaint, and admitted on all hands, "that on December 7, 1868, Wells was appointed to fill a vacancy then existing." The vacancy must have existed in the term commencing on the first Monday in January, 1867, and ending on the first Monday in January, 1869. It could not have been otherwise, for certainly no vacancy existed in a term which had not commenced. The appointment was for the unexpired period of the term from December 7, 1868, until the first Monday in January, 1869, and the bond was for the term of the appointment. It remains to be seen whether the sureties are liable for a defalcation occurring in the term succeeding the one for which they in terms became liable—whether, by any mere implication of the law, the liability of the sureties is extended over a term for which they had no intention to bind themselves.

By the failure of the officer elected at the general election in November, 1868, to qualify, the office of district attorney became and was vacant after the first Monday in January, 1869. *People v. Reed*, 6 Cal. 288; *People v. Langdon*, 8 Cal. 11; Stats. 1866, 237, Sec. 35. This vacancy it was the duty of the commissioners to fill, but having neglected to fill it, as required by law, their neglect can not be visited upon the sureties on the bond for a former term.

By the Court, WHITMAN J.:

This action is on the official bond of Wells, defendant; and from the judgment of the district court the sureties appeal. About the facts there is no dispute. There being a vacancy in the office of district attorney of Ormsby County, caused

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by the resignation of Denson, Wells was appointed in December, 1868, to fill the same, and his official bond was conditioned for faithful performance during incumbency. No term is indicated by the bond itself; but it is claimed by respondent that the law fixes it in this way: By general statute, district attorneys are elected every two years; that in the event of vacancy the county commissioners may appoint, and the appointee holds for the unexpired term; that the general election occurred in November, 1868, Wells was appointed in December following; that the only vacancy to be filled was of one month, as the person elected in November must take office in January, 1869; and that in any event a new term then began, and so the contract of the sureties was only for the month of December, 1868; and that they can only be bound for any breach therein occurring; while that assigned by the complaint, and found by the district court, is a defalcation generally between the seventh day of December, 1868, and the thirty-first day of December, 1870.

The statute of 1866, relative to officers, repeals that portion of the act of 1865 which provides that any vacancy in the office of district attorney shall be filled for the "balance of the unexpired term" by appointment; and in his case, as in that of all other county or township officers appointed by the commissioners to fill vacancies, such appointment is "until the next general election."

This language must be read reasonably. The county commissioners can not, by appointment to fill a vacancy, keep out the person lawfully entitled to a new term of the office so filled, though he may have been elected before the appointment to take possession subsequent thereto. So the premises of appellants are practically correct; but the conclusion does not necessarily follow.

Although the statute makes no provision that the district attorney, elected or appointed, shall hold until the qualification of a successor, yet he must do so under the general rule, as is evidently the public policy, simply because the presence of such an officer is necessary to the proper conduct of the public business. *Oulton v. Stratton*, 28 Cal. 44.

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So long, then, as Wells held the office continuously, without re-appointment or election, so long were his sureties bound. *People v. Aikenhead*, 5 Cal. 106; *Kruttchnitt v. Hauck*, 6 Nev. 163.

Even if not in the office *de jure*, Wells having gone lawfully into possession in the first instance was no usurper or mere intruder, but held *de facto*, claiming to discharge the duties of the office; therefore his sureties were liable, not only upon general principles, but upon the letter of their bond, as he was the incumbent of the office under any reasonable construction of such contract. *State of Nevada v. Rhoades*, 6 Nev. 352.

The judgment appealed from is affirmed.

JAMES WALSH, APPELLANT, *v.* THE VIRGINIA AND TRUCKEE RAILROAD COMPANY, RESPONDENT.

LIABILITY OF RAILROADS FOR INJURIES TO DOMESTIC ANIMALS. The leading principle of the numerous cases in reference to the liability of railroad companies for injuries to domestic animals, is that such liability is founded only upon negligence or omission of duty on the part of the company.

NO ACTION FOR ACCIDENT IN PROSECUTION OF LAWFUL ACT. If, in the prosecution of a lawful act, an accident, which is purely an accident, arises, no action can be maintained for an injury resulting therefrom.

RIGHTS OF RAILROADS TO EXCLUSIVE POSSESSION OF RAILROAD LANDS. A railroad company has the right to the possession of the land taken for the purpose of its road, and that possession is the right to its exclusive enjoyment, and to exclude all persons and beasts therefrom at any and all times.

ACTION AGAINST RAILROAD FOR NEGLIGENCE IN KILLING CATTLE—BURDEN OF PROOF. In an action against a railroad company for killing a domestic animal, which has strayed upon its track from land not belonging to its owner, it is incumbent on the plaintiff to show negligence on the part of the company.

MERE KILLING OF ANIMAL BY RAILROAD NOT EVIDENCE OF NEGLIGENCE. The mere killing of a domestic animal by a railroad train is not evidence of negligence on the part of the railroad company.

CONSTRUCTION OF RAILROAD LAW AS TO FENCES. The railroad law in reference to fences (Stats. 1864-5, 427, Sec. 40) providing that companies shall "maintain a good and sufficient fence on either or both sides of their property," taken in connection with the further provision that they shall be liable for the killing of domestic animals "when they stray upon their line of road where it passes through or alongside of the property of the owners thereof," simply

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requires companies to fence their road where it may run through or alongside of the land of private individuals; that is, on either or both sides, as occasion may demand; and even then the fencing is only for the protection of adjoining owners, and no other person can complain of the want of it.

RAILROADS NEED NOT FENCE ON PUBLIC LAND. Our railroad law (Stats. 1864-5, 427, Sec. 40) does not require railroad companies to fence their road where it runs through public land.

RAILROAD, WHEN LIABLE FOR KILLING STRAYING CATTLE. If cattle stray upon a railroad directly from the land of their owner, and by reason of the failure on the part of the company to fence their road at that point, and are killed, the company would be held liable under the railroad act (Stats. 1864-5, 427, Sec. 40) on a simple showing of the facts of such killing and neglect to fence, without any further showing of negligence; but it is otherwise if they stray from public land or from land not belonging to their owner.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action to recover \$301 for killing a cow which had strayed on the defendant's railroad track in the western part of the town of Gold Hill, in Storey County. The land at that point over which the road runs, and that from which the cow strayed, is uninclosed public land. On the trial in the court below, when the plaintiff rested, the defendant moved for a non-suit on the ground that the evidence failed to show that the killing of the cow was occasioned by any negligence or want of due care and caution on the part of defendant or its agents. The motion was sustained and judgment rendered for defendant. Plaintiff appealed from the judgment.

W. E. F. Deal, for Appellant.

I. It was not negligence in plaintiff to allow his cow to run at large. It was shown to have been the custom of the country to permit cattle to run at large upon the public land on each side of defendant's railroad, and that plaintiff used the lands for pasturing long before the road was built, and had so used them up to the time his cow was killed. *Waters v. Moss*, 12 Cal. 537; *Richmond v. Sacramento Valley R. R. Co.*, 18 Cal. 353.

II. The question of negligence was solely for the jury. The line of the road was not fenced where it passed through

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the lands used by plaintiff, and it would have been sufficient for plaintiff to prove that the cow strayed upon the track and was killed by defendant's train. But he went further and showed that he employed a herdsman to take care of his cattle and that the cow on the track could have been seen by the engineer forty rods ahead. *Redfield on Railways*, 474, 476; 18 Cal. 355.

III. The land on both sides of defendant's track is public land, and all the right that defendant can claim to it is the right of way over it. Under the statute of 1864-5, 442, defendant was bound to fence the road, and is responsible to plaintiff for killing his cow. *Cowen v. N. Y. & Erie R. R. Co.*, 3 Kirwan, 42; *Sheppard v. The Buffalo, N. Y., & Erie R. R. Co.*, 35 N. Y. 644.

W. S. Wood, for Respondent.

I. The defendant is not liable in this action under the evidence introduced unless that liability is created by statute. Defendant was in the lawful possession, as owner of its road and road-bed, and the cow was run over and killed while she was trespassing upon the defendant's property. *Sherman and Redfield on Negligence*, Secs. 457, 491; *Clark v. Syracuse and Utica R. R. Co.*, 11 Barbour, S. C. 116; *Illinois Central R. R. Co. v. Reedy*, 17 Ill. 580; *The Chicago and Miss. R. R. Co. v. Patchin*, 16 Ill. 198; *Woolson v. Northern R. R. Co.*, 19 New Hamp. 267; *Chapin v. The Sullivan Railroad*, 39 New Hamp. 53; *Terry v. New York Central Railroad Co.*, 22 Barb. 586; *Marsh v. New York and Erie Railroad Co.*, 14 Barb. 371; *L. and F. R. R. Co. v. Milton*, 14 B. Monroe, 80.

II. The bare fact that the cow was killed by being run into by the defendant's locomotive, without any further proof, is not sufficient to establish a *prima facie* case of negligence. Such a position is not warranted by the authorities, and is not founded in correct reasoning. *Scott v. Wilmington and Raleigh R. R. Co.*, 4 Jones, (Law) 432; 1 *Redfield on Railways*, 465; *Indiana and Cincin Railway v. Caldwell*, 9 Indiana, 397; *C. O. R. R. Co. v. Lawrence*, 13 Ohio State, 90;

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Lou. and Frank. R. R. Co. v. Bullard, 3 Metcalf, (Ky.) 184; *Chicago and Miss. R. R. Co. v. Patchin*, 16 Illinois, 198; *Vandegrift v. Redicker*, 2 Zabriskie, 185.

III. The statute of this State does not authorize a recovery under the proof in this cause by plaintiff. It undertakes to provide the persons to whom and the cases in which a railroad company shall pay for cattle killed on its road when it fails to fence, but plaintiff entirely failed to show that he was a person for whose protection the law was enacted, or that his case falls within the rule therein prescribed. The plaintiff is compelled to show himself to be an adjoining proprietor before he can claim that he is entitled to the protection of the act. He must establish that he is the owner of the close through which the road passes and from which the cow strayed.

The provisions of a statute requiring a railroad company to maintain fences on the sides of its track is a provision designed for the protection of adjoining owners. *Enright v. S. F. and S. J. R. R. Co.*, 33 Cal. 236; *Chapin v. The Sullivan Railroad*, 39 New Hamp. 60; *Cornwall v. The Sullivan Railroad*, 21 New Hamp. 263; *Woolson v. The Northern Railroad*, 19 New Hamp. 267; *Perke v. The Eastern Railroad*, 29 Maine, 307.

IV. Plaintiff did not undertake to show any of the circumstances attending the accident, or why the cow was upon the track, or how she came to be there, or why his herder made no effort to get her away from the danger when he saw it approaching. The silence in the testimony upon all these questions argues strongly against his right to compel the defendant to reimburse him for a loss which, from all that is shown, seems to have resulted from his own fault and negligence.

By the Court, LEWIS, C. J.:

The question as to the extent of the liability of railroad companies for injuries to domestic animals has frequently

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been before the courts, and has been considered in nearly every conceivable phase, so that at the present time the law upon this particular head is pretty thoroughly settled.

The leading principle pervading all the cases is that the liability of such companies is founded only upon negligence or omission of duty, and this principle is fortified by the cases of analagous character from the earliest history of the law. Thus it has always been held that if in the prosecution of a lawful act, an accident, which is purely so, arises, no action can be maintained for an injury resulting therefrom. *Davis v. Saunders*, 2 Chitty Rep. 639; *Goodman v. Taylors*, 5 Car. & P. 410. And in railroad cases, upon the same principle, it is always held necessary to show negligence to sustain an action for damages. *Gerres v. Portsmouth and Roanoke R. R. Co.*, 2 Iredell 324; *Lane v. Crombie*, 12 Pick. 177; *Harlow v. Humison*, 6 Cow. 189; *Vandegrift v. Redicker*, 2 Zabriskie, 185; *Louisville and Frankfort R. R. Company v. Ballard*, 2 Met. (Ky.) 177; *Chicago and Miss. R. R. v. Patchin*, 16 Ill. 198; 18 Ill. 260; 22 Barb. 574. Upon what other principle of law can a person who occasions damage while in the pursuit of a lawful business upon his own premises be held liable? Surely an individual so situated, who exercises proper caution and is not chargeable with negligence, can not be held for an accidental injury and damage resulting therefrom. There being no negligence in any sense of the word on the part of the person causing the injury, it would be a case of damage without a wrong, and consequently affording no cause of action. In all such cases, therefore, the negligence or want of that due care and caution which the situation demands is the very gravamen of the action, without which none can be maintained.

In this case it does not appear to be questioned but the defendant's business is entirely lawful, nor that it has the right to the possession of the land taken for the purposes of its road; and that possession, by all the authorities, is the right to its exclusive enjoyment, and to exclude all persons and beasts therefrom at any and all times. *Jackson v. The Rutland and Burlington R. R.* 25 Ver. 150. It follows, then,

as the defendant was engaged in a lawful act upon premises to which it had the exclusive right to the possession, it was incumbent on the plaintiff to show some degree of negligence at least to entitle him to maintain an action against it. This he entirely failed to do. Indeed there appears to have been no effort made in that direction, plaintiff relying entirely on these two propositions: 1st, that the mere killing of the animal by the locomotive engine of the defendant while in motion, was itself evidence of a want of due care; and 2d, that the defendant being required to fence its road at the point where the plaintiff's cow got on the track but not having done so, is in that respect chargeable with negligence and liable.

But it is not the law that the mere killing of a domestic animal by a railroad train is evidence of negligence. This question has frequently been before the courts and invariably ruled against the plaintiff, except where the general rule of law is abrogated by positive statute. The fact of killing an animal of value by the company's engines, says Redfield, is not *prima facie* evidence of negligence. 1 Redfield on Railways, 465. And it is so ruled in the following cases: *Scott v. The Wilmington and Raleigh R. R. Co.* 4 Jones, (Law) 432; *Indianapolis and Cincin. R. R. v. Means*, 14 Ind. 30; *Ill. Cent. R. R. v. Reedy*, 17 Ill. 580; *Chicago and Miss. R. R. v. Patchin*, 16 Ill. 198. See also Pierce's American Railway Law, 357.

Was it incumbent on the defendant to fence its road? At common law the proprietor of land was not required to fence; but every man was bound to keep his cattle on his own premises, and he might do this in any manner he chose. And this rule applies equally to railroads as to individuals. Does the statute then impose this obligation? It does not, as we understand it, require railroad companies to fence their road when it runs through public land. Its language is rather vague, but no sensible construction can be placed upon it except that it must fence its road where it runs through or alongside of land owned by individuals. That portion of the section bearing upon this question reads

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thus: "It shall be the duty of the railroad company to make and maintain a good and sufficient fence on *either or both sides* of its property, and in case any company do not make and maintain such fence, if their engine or cars shall kill, maim, or destroy any cattle or other domestic animals *when they stray upon their line of road where it passes through or alongside of the property of the owners thereof*, they shall pay to the owner or owners of such cattle or other domestic animals, a fair market-price for the same, unless the owner or owners of the animal or animals so killed, maimed, or destroyed shall be negligent or at fault." Statutes of 1864-5, page 442. Now it will be seen, that although railroad companies are in general terms required to fence their road, it does not appear to be made their duty absolutely to fence *both* sides, but "either or both." What is to be understood by this? The requirement would be literally complied with if the company simply fenced one side of its road, for the requirement is in the disjunctive, to fence one side or both. It certainly could not have been the intention of the legislature to leave so important a matter optional with railroad companies, to fence; and yet it can not be denied that by the strict interpretation of the language they are only required absolutely to fence one side; so, if a fence were made and maintained along the entire length of one side of the road, nothing more could be required under this section.

It is quite evident that this was not what was intended to be required, for it would simply result in an absurdity. What then was the intention of the legislature? Doubtless simply to require the companies to fence their road where it may run through or alongside of the land of private individuals; that is, on either or both sides as occasion may demand. This view is strengthened by the fact that the statute only makes the company liable for the injury to, or killing of stock "when they stray upon their line of road, where it passes through or alongside of the property of the owners of such cattle." So, too, it had frequently been held that fencing, even when required by statute, is only for the protection of adjoining owners, and that no other person

can complain of the want of it. *Jackson v. Bur. and Rut. R. R.*, 25 Vt. 150. Now this statute may have been adopted in reference to those decisions, and hence perhaps the requirement of a fence on "either or both sides" where there were owners to be protected. At any rate this case does not come within the statute, for it in terms only renders the company liable where the animals killed or injured stray upon the road directly from the land belonging to their owners. It would appear from this language that if they stray upon the track, from public land, or from land not belonging to the owner of the animals, it was not intended by the statute to render the road liable. This construction also is in conformity with decisions rendered before the adoption of the statute. Thus it is held in *Jackson v. Burlington and Rutland R. R. supra*, that a railroad company may be held liable for injury to cattle where they get upon the track directly from the land of the owner, but if they first stray upon the land of others and from there get on the track and are killed or injured, no liability is imposed on the company. And so it has frequently been held.

Under this statute, undoubtedly if cattle stray upon the railroad directly from the owner's land, by reason of the failure on the part of the company to fence the road at that point, it would be held liable by the simple showing of the facts that the company had neglected to fence the road along the land of the person owning the animals, that they strayed directly from his land on the road and were there killed, without showing any further negligence; for the failure to build the fence where required together with the other facts above mentioned would bring the case directly within the statute and without further showing create a cause of action. But where the case is not brought within the statute, negligence is the only ground of action, as we have already shown.

This case is not brought within the statute; for it is not shown that the company failed to fence at a point where it should have done so, nor that the animal killed strayed from land belonging to its owner on to the railroad, but that it came from public land unoccupied and unclaimed upon the

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track; and as no negligence was shown, no cause of action was established. Nor could it help the plaintiff in this case if it were admitted that he had the right to allow his cattle to depasture on the public land, or even on the railroad track itself; for in that case both the company and the plaintiff's cattle would be rightfully on the track, and even in such case negligence or a want of due care must be shown to authorize a recovery for injury such as that here claimed.

Therefore the non-suit was properly granted.

Judgment affirmed.

GARBER, J., did not participate in the foregoing decision.

A. M. WORTHING, RESPONDENT, v. E. B. CUTTS,
APPELLANT.

NEW TRIAL STATEMENT NEED NOT DESIGNATE GENERAL GROUNDS. A statement on motion for new trial need not designate the general grounds of error relied on, but only specify the particulars wherein the error lies—the Practice Act requiring the notice to designate the general grounds, and the statement to contain the specifications.

APPEAL FROM ORDER GRANTING NEW TRIAL—SUFFICIENCY OF EVIDENCE. The rule not to disturb the action of the court below as contrary to evidence where there is a conflict of evidence, applies to an appeal from an order granting a new trial for insufficiency of evidence.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The parties had been partners in the blacksmithing business at the town of Reno, in Washoe County, under the firm name and style of Cutts & Worthing. They dissolved about February, 1870. The material facts are stated in the opinion. Defendant appealed from the order of the court below granting the plaintiff a new trial.

Webster & Knox, for Appellant.

I. The statement on motion for new trial did not set forth the grounds upon which plaintiff intended to rely, and

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should have been disregarded and the motion denied. *Wing v. Owens*, 9 Cal. 247; *Adams v. Oakland*, 8 Cal. 510; *McWilliams v. Herschman*, 5 Nev. 266.

II. The evidence set forth in the statement fully sustains the verdict of the jury as to plaintiff's right to recover no more than the amount of the verdict. The preponderance of evidence is in favor of defendant, and the jury are judges of its weight when conflicting. 3 *Graham & Waterman*, 1267, 1268; *Miller v. Simpson*, 2 Mills Const. R. 440; *Garland v. Willing*, 6 Geo. 310; 2 S. C. Const. R. 593; 7 Mass. 261. When the court and jury differ on a question of fact the jury are presumed to be right. 3 *Graham & Waterman*, 1284. Where there is a conflict in the testimony the verdict of a jury should not be disturbed. *State v. Yellow Jacket S. M. Co.*, 5 Nev. 418; 2 A. K. Marshal, 521; 3 *Graham & Wat.* 1241. Where there is any evidence to support the verdict it should stand notwithstanding the judge who presided at the trial may personally disapprove of it. 3 *Graham & Waterman*, 1269, 1296; *Ophir S. M. Co. v. Carpenter*, 4 Nev. 548.

III. In this case there is no such preponderance of evidence against the verdict as will justify the action of the court below in setting it aside and granting a new trial. The preponderance of evidence is in favor of defendant and sustains the verdict. 3 *Graham & Wat.* 1249; *Hall v. Hodge*, 1 Texas, 323; *Winchell v. Latham*, 6 Cow. 682; *Lawrence v. Burnham*, 4 Nev. 361.

Thomas E. Haydon, for Respondent.

I. An order granting a new trial is almost entirely within the discretion of the court below, rarely the subject of an appeal, most rarely deemed worthy the consideration of an appellate court, and never so where there is a conflict of evidence or the slightest testimony to uphold it. See *State v. Yellow Jacket S. M. Co.*, 5 Nev. 421; *Phillpotts v. Blasdel*, ante, 61; *Oullahan v. Starbuck*, 21 Cal. 414; 12 Cal. 48; 21 Iowa, 337; *Wilcoxon v. Burton*, 27 Cal. 232.

II. It is not necessary to set out the general grounds of a motion for new trial in a statement. That is properly

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done in the notice, and the statement is merely required to specify the particulars in which the evidence is not sufficient or the particular errors of law, which this statement does in the assignment of errors at its close. Practice Act, Sec. 197.

By the Court, LEWIS C. J.:

Action by Worthing to recover the sum of nine hundred and forty-three dollars alleged to be due upon the settlement of a partnership account. Verdict and judgment for the plaintiff for fifty dollars. Motion was made by the plaintiff for new trial, which was granted, and the defendant appeals.

The first point made in this court is that the statement on motion for a new trial should have been disregarded by the court below and as a consequence that it should have denied the motion because the statement did not designate the general grounds of error relied on. But the Practice Act does not require such designation, but only that the statement shall specify the *particulars* wherein the error lies. The *notice of motion* is required to state generally the grounds of error, and then it is provided by section 197 that "when the notice designates as the ground upon which the motion will be made, the insufficiency of the evidence to justify the verdict, or other decision, the statement shall specify the particulars in which the evidence is alleged to be insufficient. When the notice designates as the ground of the motion error in law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded." Thus it will be seen the notice of motion for new trial shall designate the general grounds of the motion; and the statement shall contain the specifications. The statement in this case contains the required specifications, but does not contain the general grounds of the motion, nor under the Practice Act was it necessary. The objection to the statement therefore seems unfounded, and it was properly considered by the court below.

When a new trial is granted by the judge at *nisi prius* upon the ground that the verdict is not warranted or sustained by the evidence, and an appeal is taken from such order, the rule invariably governing the appellate tribunal is not to disturb the action of the judge below if there is a material conflict in the evidence. It is said by the supreme court of California in *Oullahan v. Starbuck*, 21 Cal. 413, "It is not enough, however, to authorize any interference with the action of the court below either in granting or refusing a new trial for alleged insufficiency of the evidence, that an appellate court, judging from the evidence as it is reduced to writing, would have come to a different conclusion. The court before which the witnesses are examined is generally better qualified to determine the propriety of granting or refusing a new trial on this ground than any appellate court; and its action in this respect will not be disturbed except for the most cogent reasons."

In the case at bar, it cannot be denied that the evidence was conflicting and that the positive testimony of the plaintiff sustained his claim; hence under the rule above stated we cannot disturb the action of the judge below.

The order granting a new trial must be affirmed.

GARBER, J., did not participate in the foregoing decision.

JOSEPH JONES, RESPONDENT, v. JOHN S. CHILDS
AND HENRY VANSICKLE, APPELLANTS.

INDEMNITY BOND AGAINST "LIABILITY." To authorize a recovery upon a mere bond of indemnity, that is, a bond against damages, actual damage must be shown; but if the indemnity be not only against actual damage or expense but also against any *liability* for such damage or expense, a right of action is complete when the obligee becomes legally liable for damages.

ACTION ON INDEMNITY BOND AGAINST LIABILITY, WHAT TO BE SHOWN. In an action on a bond given to a sheriff to indemnify him against "all damages, expenses, costs and charges, and against all loss and liabilities which said sheriff shall sustain or in any wise be put to," it is sufficient to show a liability by way of judgment against him, without showing payment thereof.

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GOLD COIN JUDGMENT FOR LIABILITY ON INDEMNITY BOND. A judgment against the sureties on a bond indemnifying a sheriff against liability, where the penalty of the bond and also the liability incurred by the sheriff are payable in gold coin, is properly rendered in gold coin.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are stated in the opinion. There was a judgment in the court below against the defendants for the sum of \$1151 15 and costs, in gold coin. Defendants appealed from the judgment.

Geo. W. Harding and T. W. W. Davies, for Appellants.

I. This case comes clearly within the rule laid down in *McBeth & Bollen v. Vansickle*, 6 Nev. 134. Jones being the real party in interest and the real beneficiary in the indemnity bond, was the proper and only party to sue on it; but when he received satisfaction of his judgment against Bollen, his right of action became extinguished.

If, however, Bollen could have maintained a suit and had commenced it before satisfaction of the judgment against him, he might have recovered sufficient to satisfy the same; but after satisfaction by him the material question would be one of damage; that is, what it cost him to satisfy the judgment. By the strict terms of the contract the sureties only undertook to hold Bollen harmless against any claim of Jones, and they would fulfill their contract by paying Bollen what it cost him to protect himself against Jones. See *Gilbert v. Winans*, 1 Comst. 550.

II. The bond is not a bond of indemnity in any event, but an agreement of Childs and Vansickle to guarantee that Wilcox & Brown shall hold Bollen harmless. Their contract is to answer to Bollen for any damages that may result to him from the default of Wilcox & Brown to hold Bollen harmless; and in this view it becomes the only material question to consider, what loss has Bollen sustained by reason of the failure of Wilcox & Brown to save him harmless? For this reason the court below erred in giving judgment as

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prayed for; in refusing to consider the question of actual damage sustained by Bollen on account of the default of Wilcox & Brown to save him harmless, and in disregarding the plea of *non damnificatus*. Sedgwick on Damages, 342; 1 Comst. 550; 42 Barb. 199; 5 Barb. 385; 8 Johns. 248; 29 Missouri, 275; 27 Conn. 31; 1 Hill, 145; 7 Hill, 501; 25 Cal. 164; 9 Ohio, 467; 6 Wallace, 95; 10 Johns. 549.

III. Judgment for gold coin was in direct conflict with the most recent decisions of the supreme court of the United States in relation to the question of what is a legal tender in payment of debts.

Moses Tebbs and T. W. Healy, for Respondent.

I. Bollen could have sued upon the bond and recovered, and certainly his assignee can stand exactly in his place. The only question to be determined is, was any loss or liability sustained? if so, the sureties must pay it by the condition of the bond. Does the satisfaction of the judgment against Bollen release the sureties from the penalty of their bond? Most assuredly not: to say so would imply that the relation of principal and surety existed between them, when in truth they occupy a position of antagonism.

II. A liability may be indemnified against and is recoverable as an actual damage. *Brown v. Jones*, 5 Nev. 374; *Kramer et als. v. Trustees of Farmers' Bank*, 15 Ohio, 253. The defendants here became liable by the terms of the bond the moment the property sold was found to be the property of Jones; and nothing less than a payment of the money by them to plaintiff or cancellation of the bond by consent of plaintiff can ever change their liability.

III. Appellants seem to mistake the rule laid down in *McBeth & Bollen v. Vansickle*, 6 Nev. 134. There is a difference between a replevin bond as in that case and an indemnity bond as in this.

IV. As to the point that there was error in rendering a judgment in gold coin, the U. S. Supreme Court has held that courts have a right to render such judgment where

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there is a specific contract. *Bronson v. Rhodes*, 7 Wallace, 229; 3 Wallace, 320.

By the Court, LEWIS, C. J.:

This action is brought upon an undertaking given to the sheriff of Douglas County and assigned to the plaintiff under these circumstances. An execution having been issued upon a judgment rendered in a certain action in favor of Wilcox & Brown against John T. Williams, a levy was made by the sheriff upon property claimed by the plaintiff Jones. Wilcox & Brown however directed the sheriff to sell the property so levied on in accordance with the execution, and gave him the bond here sued on to indemnify him against any liability which he might incur thereby. The property was sold accordingly, and Jones subsequently brought action against the sheriff and recovered judgment in the sum of eleven hundred and fifty dollars. To satisfy this judgment the sheriff assigned the bond given for his own indemnity to Jones, who accepted it in satisfaction of his judgment and now brings this action to recover of the defendants the amount so recovered.

The bond is set out and made a part of the complaint and all the material facts are fully pleaded; but the defendants by their answer only deny that Bollen, the sheriff, was damaged in the sum alleged in the complaint or in any sum by reason of the action or the judgment rendered against him in the case of Jones against him or that they, the defendants or either of them, ever became liable or are now liable to Bollen in the amount of the judgment and costs referred to in the complaint. There is no denial that the undertaking was regularly executed and delivered to Bollen, nor is it denied that the judgment was regularly rendered against him in the action by Jones, nor that the undertaking was properly assigned. Upon these pleadings (a motion to that end having been made) the court below rendered judgment, from which the defendants appeal. Two points only are relied on for a reversal of the judgment: 1st, that no recovery could be had on the undertaking until it was shown that

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Bollen had paid the judgment obtained against him or that he was actually damnified; and 2d, that it was error to render a judgment in gold coin. Neither of these points are well taken.

It is undoubtedly the rule of the common law courts that to authorize a recovery upon a mere bond of indemnity actual damage must be shown. If the indemnity be against the payment of money the plaintiff is generally required to prove actual payment, or that which the law considers equivalent to actual payment. But it has very generally been held that if the indemnity be not only against actual damage or expense, but also against any *liability* for such damage or expense, the party need not wait until he has actually paid the demand against him, but his right of action is complete when he becomes legally liable for damages. This is in strict conformity with the letter of the bond or undertaking, for if the indemnity be given against any liability, clearly when the liability is legally imposed the condition is broken and a right of action is at once created. *Webb v. Pond*, 19 Wend. 423; *Chase v. Stranahan*, 8 Wend. 452. See also the question considered in *Gilbert v. Merrian et als.*, 1 Comstock, 550. Thus the difference in the language of obligations has given rise to the two classes of decisions; those holding that no cause of action arises until there is actual damage which are cases arising upon obligations of indemnity purely; and the other class, like *Chase v. Stranahan*, where the bond or undertaking is not only of indemnity but also against liability, in which cases it is very generally held that the cause of action is complete when the liability is established, and therefore that no actual damage or payment of the liability need be shown.

In this case the undertaking is given to indemnify not only against damage and expense but also, as in the case of *Chase v. Stranahan*, against all liabilities. The language being—"now therefore, the conditions of this obligation is such, that if the said plaintiffs, Wilcox & Brown, their heirs, executors, and assigns shall well and truly indemnify and save harmless the said sheriff, his heirs, executors, administrators,

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and assigns, of and from all damages, expenses, costs, and charges, and against all loss and liabilities which said sheriff shall sustain, or in any wise be put to for or by reason of the levy, sale or retention under said execution of the property claimed as aforesaid, then the above obligation to be void—otherwise to remain in full force and effect.” By the language of this instrument the defendants became liable the moment the judgment was obtained against Bollen, for that was a liability imposed upon him growing out of the transaction mentioned in the undertaking, and thus the case comes directly within the rule above mentioned. Bollen then had a right of action on the undertaking, and that, he regularly assigned to the plaintiff. The first assignment of error is therefore not sustained.

The judgment was properly rendered in gold coin. The penalty of the undertaking is in coin and the sheriff's liability was also in coin; and we have invariably held since the case of *Linn v. Minor*, 4 Nev. 462, that such judgment is properly rendered on contracts calling for that character of money. And the supreme court of the United States, although sustaining the legal tender act (*Knox v. Lee*, 12 Wallace, 457) yet holds as this court had done before, that a judgment in coin can be rendered on a contract calling for that kind of money. *Trebilcock v. Wilson*, 12 Wallace, 687.

Judgment below affirmed.

GARBER, J., did not participate in the foregoing decision.

W. W. MCCOY, RESPONDENT, *v.* I. C. BATEMAN AND
D. E. BUEL, APPELLANTS.

ACTION FOR RENT—LESSEE CAN NOT DENY LESSOR'S TITLE. Lessees, after the enjoyment of their term, can not defeat an action of their lessor for rent by setting up that they have paid the rent upon a judgment recovered against them by persons claiming to be co-tenants with their lessor.

ACTION FOR RENT BY PARTY OTHER THAN LESSOR—INTERPLEADER. If a lessee be sued for rent by any person other than the lessor and fears liability to double payment, he can escape such liability by bill of interpleader.

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INSTRUCTION NOT TO CONSIDER EXCLUDED EVIDENCE. An instruction warning the jury against the consideration of evidence, which has been offered but properly excluded, is perfectly proper.

CONFLICTING EVIDENCE. The rule that the Supreme Court will not consider the weight of conflicting evidence has been so often reiterated as to become somewhat monotonous.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

This was an action to recover \$426 61, balance of rent alleged to be due on a lease for four months commencing November 11, 1869, of the McCoy Furnace at Eureka, Lander County; \$521 90 for breach of contract to receive and pay for certain bullion, and \$100, damages done the furnace during the lease. The defendants in their answer set up that one undivided fourth of the demised premises belonged to David Hughes and H. Mayenbaum who were entitled to all the balance of rent due, and that defendants had paid it to them. The answer denied any breach of contract and any damage to the furnace.

On the trial the plaintiff testified, among other things, that at the time he leased the furnace he was in his opinion the sole owner of it; but that the ownership involved a question of law between himself on one side and Hughes and Mayenbaum on the other and that he had subsequently purchased their asserted rights; that he was nevertheless in full possession of the property and sole manager, and that the defendants went into the possession under the lease from him and remained in undisturbed possession during the term. The defendants, among other things, offered to prove that before the lease was made the plaintiff owned only three-fourths of the furnace; that the other fourth was owned by Alonzo Monroe, which afterwards and before the date of the lease became the property of Hughes and Mayenbaum; that Hughes and Mayenbaum as such owners had in August, 1870, recovered judgment against defendants for the same rent sued for in this action, and that defendants had paid the same to them. Plaintiff objected to the proposed evidence; and the court sustained the objection and excluded it.

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The court charged the jury as follows: "You are instructed that no evidence that any rent has been paid by defendants to Hughes and Mayenbaum can be considered by you, and that if any balance of the amount agreed to be paid by the lease in evidence has never been paid to McCoy, then he is entitled to recover that balance in this action."

There was a verdict in favor of the plaintiff for \$1040 53, the amount of his claim; and judgment was entered accordingly. Defendants moved for a new trial, which was overruled; and they then appealed from the judgment and order.

Geo. S. Hupp, for Appellants.

No brief on file.

Selden Hetzel, for Respondent.

I. No right existed in either Monroe or Hughes and Mayenbaum to a share in the rents and profits of the demised premises—McCoy having been, as is in evidence, in full possession of the property—unless in pursuance of an express agreement by them, with McCoy, of an ouster. See *Pico v. Columbet*, 12 Cal. 414; *Goodenow v. Ewer*, 16 Cal. 461; *Wilcox v. Wilcox*, 48 Barbour, 327.

II. The defendants having remained in possession during the entire term of the demise, their obligation to pay rent to the lessor is not set aside by any payments made subsequently to his co-tenants. An eviction is necessary. *Edgerton v. Page*, 20 N. Y. 281; 10 Abbott Prac. 119; *Giles v. Comstock*, 4 N. Y. 270; *Moffatt v. Strong*, N. Y. Superior Court, 1861, and authorities there cited.

By the Court, WHITMAN, J. :

Appellants, under a lease from respondent, entered and enjoyed undisturbed possession of certain premises for their term; surrendered possession to their lessor; paid him a portion of the rent; refused payment of the balance, which they paid upon a judgment obtained long after the termination of their tenancy by certain parties claiming to be

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co-tenants of the lessor. This was pleaded as defense to the action of respondent to recover the balance of rent to him unpaid. The district court refused to allow proof to support the plea. This is assigned as error.

Whatever view may be taken of the nature of the action, the testimony was inadmissible. Appellants had enjoyed their term and received all that they had bargained for. It was not for them to be picking flaws in respondent's title nor to select some other to whom to pay the rent. If they feared any double payment,—admitting now that any such suit as that instituted against them by lessor's co-tenants could have been properly maintained,—they could have escaped any liability by bill of interpleader. *Vernam v. Smith*, 15 N. Y. (1 Smith) 328.

The instruction excepted to was under the previous ruling of the court perfectly proper; it simply warned the jury against the consideration of evidence offered, but excluded. There was some evidence tending to support the claim for damages, and no contradiction thereof; so this court, under the rule so often reiterated as to become somewhat monotonous, must decline to interfere with the order refusing a new trial.

The judgment and order are affirmed.

JACOB N. WINTER, RESPONDENT, v. WILLIAM H.
WINTER, APPELLANT.

ALLEGATION BY WAY OF RECITAL — GENERAL DEMURRER INSUFFICIENT. If a complaint states a substantial allegation only by way of recital, the defect should be objected to specifically and can not be taken advantage of on general demurrer.

PREScriptive TITLE—"CLAIM OR COLOR OF RIGHT." A complaint setting forth that defendant for upwards of five years has been diverting and using water belonging to plaintiff, does not allege a prescriptive right in defendant, there being no allegation that such diversion and use was under claim or color of right.

RIGHT TO ANSWER AFTER DEMURRER OVERRULED NOT ABSOLUTE. Where a demurrer to a complaint was overruled and judgment rendered for plaintiff, there being neither showing nor suggestion of a defense on the merits: *Held*, that defendant was not entitled as a matter of absolute right to answer.

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APPEAL FROM ORDER REFUSING TO SET ASIDE JUDGMENT. The propriety of an order refusing to set aside a judgment can not be considered, if such order be not appealed from within the time prescribed by the statute.

"DEFAULT" NOT NECESSARY TO SUPPORT JUDGMENT AFTER DEMURRER OVERRULED. Where a demurrer to a complaint has been overruled an entry of default is not a prerequisite to the rendition of judgment.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The complaint in this case alleged:

"1. That the said plaintiff, Jacob N. Winter and his grantors, are now and since the year 1857 have been the owners of and in the lawful and peaceable possession of a certain tract of land, situate in the County of Douglas and State of Nevada, containing about two hundred acres and known as the Jacob N. Winter Ranch, in Jack's Valley, State and county aforesaid.

2. Plaintiff further shows that upon the tract of land now owned by him in the year 1858 and continuously since, except when diverted by the said defendant, the waters of a certain creek, known as the Jack's Valley Creek, naturally flowed, and that in the year 1858 and continuously since during the irrigating season of each year, during the space of two days and nights of each eight days in the months of April, May, June, July, August, and September, the whole of the waters of said creek were used and appropriated by the plaintiff upon his said lands for irrigating and other useful purposes, except when diverted by the said defendant; and that all the waters of said creek were and are necessary to be used on said lands of this plaintiff for the space of time above mentioned (except as hereinafter set forth) for the purposes aforesaid, the said plaintiff since the year 1858 having been and now being engaged in cultivating crops of grain, hay, vegetables, orchards, and in pasturing stock on said lands.

3. That during the irrigating seasons of the year since 1858, all the waters of said creek for the period of two days and nights of each eight days in the month aforesaid (except as hereinafter stated) were necessary to be used and were used upon the lands of this plaintiff for the purposes aforesaid, except when wrongfully diverted by said defendant.

4. That the said defendant is of right entitled to the use of the said waters of said creek one eighth of the time that said plaintiff has the right to use and enjoy the same and is

not of right entitled to use the waters of said creek for any greater portion of the time that plaintiff has the use of the same; that when said plaintiff has the use of the waters of said creek for two days and nights, said defendant is entitled to use of all the waters of said creek for the space of six hours out of the forty-eight to which this plaintiff is entitled to use and enjoy the same.

5. That during the irrigating season of the year 1871, and when all the waters of said creek were necessary to be used and were being used upon the plaintiff's lands for the purposes aforesaid, and after the rights of plaintiff had become fixed and vested by prior use and appropriation, (the said waters being conveyed over and through the lands of plaintiff by means of ditches,) the said defendant wrongfully and unlawfully, and in total disregard and violation of the rights of this plaintiff, has diverted the waters of said creek from its natural channel, and by means of ditches and flumes has caused the waters of said creek to flow upon the lands of defendant for a longer period of time than six hours out of the forty-eight to which this plaintiff is entitled to use the same, to wit: for the space of one day and night of the time plaintiff is entitled to use said waters, and has thereby deprived said plaintiff of the use and enjoyment of the waters of said creek for the space of eighteen hours in each eight days of the irrigating season to which he is entitled, to his great and irreparable damage in the injury done to his crops, orchards, meadow, and pasture lands, and his stock.

6. That by reason of the wrongful and unlawful diversion of the waters of said creek by the said defendant, his agents, servants or employees during the irrigating season of the year 1871 thus far, this plaintiff has been damaged in injury done to his crops, orchards, and pasture lands and stock in the sum of \$500, U. S. gold coin.

7. That defendant threatens the continued diversion of the waters of said creek during the remaining part of the irrigating season of the present year and indefinitely in the future; and if said waters shall be diverted as they are now being diverted by the defendant the damage to the crops, orchards, pastures, and stock of this plaintiff on said lands will be for the remainder of the present irrigating season \$500 in U. S. gold coin.

8. Plaintiff further shows that the amount of water now flowing in the natural channel of said creek and its head branches is much less than the quantity of water that has

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been for many years last past appropriated and used by this plaintiff on his said lands during the irrigating season for the purposes aforesaid."

The prayer was for a decree declaring plaintiff entitled to the exclusive use and enjoyment of all the waters of Jack's Valley Creek for the space of forty-two hours in each eight days of the irrigating season of the year, and defendant entitled to the use and enjoyment of the waters of said creek for the space of six hours in each eight days of the irrigating season of the year and no more; also for damages in the sum of \$500, and \$500 additional if the diversion should continue the balance of the irrigating season and for general relief.

Defendant interposed a demurrer on the grounds: 1st, that the complaint did not state facts sufficient to give the court jurisdiction, in so far as it did not state where Jack's Valley Creek was, nor the land upon which it flowed or upon which the alleged diversion took place; 2d, that the complaint did not state facts sufficient to constitute a cause of action in so far as it did not show that plaintiff had or ever had any exclusive right to the water of said creek for any period of time whatever, but did show that plaintiff's rights, if any, were subject and subservient to defendant's rights, it being inferentially stated that defendant had been continuously diverting said water since 1857 without any complaint or objection by plaintiff; and, 3d, that the complaint showed that, if plaintiff ever had any cause of action against defendant, it had long since been barred by the statute of limitations.

At the December term, 1871, of the court below, the demurrer seems to have been submitted without argument and was overruled; and it was thereupon, and as a part of the same order, directed by the court that plaintiff should have judgment as prayed for in the complaint; and judgment was entered accordingly, on December 4, 1871. Within a day or two afterwards defendant moved to set aside the judgment, which motion was denied on December 12, 1871. On July 8, 1872, defendant filed notice of appeal from the

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judgment and also from the order refusing to set aside the judgment.

In the statement on appeal, the circumstances of the overruling of the demurrer and entry of judgment are thus stated:

"On the 4th day of December, 1871, upon the hearing of the demurrer in the above entitled cause, D. W. Virgin, Esq., whose name appears as the attorney of defendant signed to the demurrer in said cause, stated in open court that he was simply employed to interpose a demurrer, and that with the filing and serving of the same his connection with the case terminated. Thomas Wells, appearing for defendant, confessed the demurrer as not well taken and asked for time to answer. P. H. Clayton moved the court for judgment upon the pleadings, insisting that it was evident from the statements of defendant's counsel that the demurrer was interposed purely for delay; when the court announced that, being satisfied that the demurrer was interposed only for delay, the motion of plaintiff's counsel be allowed; and said court overruled and disallowed said demurrer, and then and there refused to allow said defendant to answer to the merits in said action, and ordered judgment and decree in favor of plaintiff, as prayed for in his complaint."

Ellis & King, for Appellant.

I. The demurrer that the complaint does not state facts sufficient to constitute a cause of action was well taken. Plaintiff alleges his ownership of a piece of land and then indulges in a long narrative as to the use of water upon the same as a fact, but no where claims the *right* to use any certain part or proportion of the stream, or any water whatever, or his possession of any water right, privilege, or franchise whatever. He makes no claim to any exclusive use or right to water and only alleges that during the irrigating season of each year since 1858 the plaintiff had used and diverted, except where the same was being used and diverted by the defendant, certain water. There is nothing in the complaint to show how much or little water either plaintiff or defendant used in any year including 1858 up to 1871, except that in 1871 defendant used and diverted one-half of all the water now claimed by the plaintiff; and if we take this as

illustrating the use and appropriation of water by defendant during the prior years, it becomes a criterion of the respective rights of the parties and plaintiff pleads himself out of court; for he nowhere alleges a greater diversion of water by defendant than he himself in fact and by operation of law alleges the defendant to be entitled to, by user, appropriation and diversion continuous since 1858—more than twelve years. It seems to us that plaintiff has stated a perfect prescriptive right in defendant under our statute. There is no pretense that our diversion and use of water was by license from plaintiff or against his objection or protest, while all the time within his knowledge.

II. The judgment rendered must have been a “judgment upon failure to answer.” There is no pretense of a dismissal by plaintiff, or of a non-suit, nor was it a judgment upon the merits; and there only remains a “judgment upon failure to answer.” In such case the words and meaning of the Practice Act, Sec. 152, seem plain and explicit that the entry of default is an absolute prerequisite to the right to such judgment upon failure to answer.

III. The Practice Act, Sec. 67, provides that “When a demurrer to a complaint is overruled and there is no answer filed the court may * * * allow the defendant to answer.” We hold that “may” here means “must.” Whenever the term “may” is used in connection with a public office, matter, trust or confidence or in which the public have an interest, “may” means must. See *Howe v. Coldren*, 4 Nev. 177. In this case the application was made immediately. The showing of merits and defense was, that not a single day’s delay was caused or could have been caused by the filing of the demurrer, while defendant’s sworn answer filed upon the hearing of the motion showed a good and perfect defense, which if substantiated entitled him to relief against the plaintiff.

T. W. W. Davies, for Respondent.

I. The appeal from the order refusing to set aside and vacate judgment was not taken within the sixty days pre-

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scribed by law, (Practice Act, Sec. 330) and therefore cannot be considered.

II. An inspection of the complaint and demurrer will show that the demurrer was properly overruled; and in fact the defendant, by his counsel, in open court, confessed the demurrer as not well taken. Upon the confession of the demurrer, it was in the discretion of the court below to allow the defendant to answer; and in all cases of discretion an appellate court will not interfere except in cases of gross abuse of judicial discretion. *Smith v. Brown*, 5 Cal. 118; *Broadus v. Nelson*, 16 Cal. 79.

By the Court, GABBER, J.:

None of the points assigned for error are well taken. The complaint would have been held sufficient as a declaration at common law upon a general demurrer. *Luttrell's Case*, 4 Co. 88 (b); *Ashley v. Ashley*, 4 Gray, 197; *Story v. Odin*, 12 Mass. 157; *Willers v. Ball*, 1 Shower, 7; 2 Saunders, 113, *et seq.*; *Jackson v. Savage*, Skinner, 316; *Prickman v. Tripp*, Skinner, 389; Com. Dig. Pleader, C. (39); 1 Chitty Pl. 380-381; *Ib.* 391-2; *Northam v. Hurley*, 72 Eng. C. L. Rep. 665. The demurrer was therefore properly overruled. The complaint does state that the plaintiff was entitled to the water. It is true this allegation is by way of recital, but no such objection was specified in the demurrer, and it is well settled that it can not be insisted upon under a general demurrer. It is clear that the complaint does not state a prescriptive right in the defendant. There is no allegation that the diversion and use of the water by the defendant was under claim or color of right.

The defendant was not entitled, as a matter of absolute right, to answer after the demurrer was overruled; and prior to the entry of the judgment he made neither showing nor suggestion of a defense on the merits.

We can not consider the propriety of the ruling on the motion to set aside the judgment, for the reason that the

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appeal from the motion was not taken within the time prescribed by the statute.

An entry of default was not a prerequisite to the judgment. This was not a "judgment upon failure to answer": *quoad hoc* the demurrer was an answer. 34 Cal. 27.

The appeal from the order is dismissed, and the judgment appealed from is affirmed.

LEWIS, C. J., did not participate in the foregoing decision.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

OCTOBER TERM, 1872.

THE STATE OF NEVADA, RESPONDENT, *v.* MOLLIE
- FORSHA, APPELLANT.

CRIMINAL LAW—CHARGE NOT PART OF RECORD. A charge given by the court of its own motion in a criminal case is not a part of the record, and can only be brought up on appeal by bill of exceptions.

CRIMINAL PRACTICE ACT, SECS. 426 AND 450. Sections 426 and 450 of the Criminal Practice Act, providing that written charges presented or asked form part of the record, do not apply to a charge given by the court of its own motion—such charge not being presented or asked.

PRESUMPTION IN FAVOR OF INSTRUCTIONS, WHERE EVIDENCE NOT APPEALED. Where the evidence in a criminal case is not taken up on appeal, an instruction will be presumed to have been warranted by and applicable to the proofs, unless appellant shows that it could not under any state of proof have been correct.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The defendant was indicted for the murder of Thomas Kelly at Reno in Washoe County on December 10, 1871. She was tried in January, 1872, and convicted of murder in the second degree, and was afterwards sentenced to the State prison for the term of twenty-seven years. She appealed from the judgment and orders refusing motions for

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new trial and in arrest of judgment. The transcript on appeal embraced the written charge of the court below and the instructions asked and given, but contained no bill of exceptions or statement.

W. E. F. Deal, for Appellant.

I. The instructions must be considered as the instructions of the court. Even though asked by defendant's attorneys, if any error appear in them appellant should have a new trial, as error committed by her attorneys in drawing the instructions are as fatal to her as if committed by the court. If a court gives an erroneous instruction asked by defendant, such instruction becomes a part of the court's charge to the jury; and if the error is against defendant she should not be prejudiced.

II. The facts supposed by the instructions are that the deceased was a mere waiter, cook or servant in a public eating-house; that defendant entered the eating-house as a guest; that she was ejected by force by deceased; that a conflict between defendant and deceased ensued; that deceased was the assailant; that the assault was made under circumstances calculated to excite the fears of a reasonable person; that defendant was in danger of receiving a serious bodily harm, and that she struck under the influence of those fears and not in a spirit of revenge.

Appellant claims that, under such a case as that supposed by the instruction as asked by her, the killing was a justifiable homicide; but the court inserted that in order to acquit her it was necessary that she should have endeavored to decline any further struggle—that is, that although deceased was the assailant and although defendant was in imminent peril of receiving some great bodily harm, she should have first retreated to the wall before she struck a blow in self-defense. The charge as given was calculated to mislead and confuse the jury. See *State v. McGinnis*, 5 Nev. 339; *People v. Hobson*, 17 Cal. 430.

L. A. Buckner, Attorney General, for Respondent.

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By the Court, LEWIS C. J.:

There is no bill of exceptions in this case; but it is claimed that any error committed in the instructions and charge given to the jury may be reviewed without it, and such are the only errors complained of in this court.

But the charge given by the court of its own motion is not made a part of the record, and therefore can only be brought to this court by means of a bill of exceptions. Sections 426 and 450 of the Criminal Practice Act have reference only to instructions asked by the respective parties and not to the charge of the court, as the language clearly shows; the first declaring that "when any written charge has been presented and given or refused, the question or questions presented in such charge need not be excepted to nor embodied in a bill of exceptions, but the written charge itself with the endorsement showing the action of the court, shall form part of the record; and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions;" the latter section, which declares what shall constitute the record of the action, mentions the "written charge *asked* of the court if there be any." These sections clearly show that only such instructions as are asked of the court by the parties are to be considered a part of the record, and the charge given by the court of its own motion is not included and can only be brought up by bill of exceptions. So too it is held in California upon an identical statute. *People v. Hart*, October Term, A. D. 1872.

It is claimed, however, that the instructions asked by the defendant and given by the court are erroneous, and therefore that the verdict and judgment should be reversed for that reason. If it be admitted that a defendant can ask an erroneous instruction to be given and afterwards take advantage of the error, still it will not avail the defendant in this case; for it is not shown with sufficient certainty that the instructions complained of were improperly given. Those complained of read thus: "1st. If the jury believe from

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the evidence that the defendant as a reasonable person believed that she was in danger of receiving then and there serious bodily harm from the said Kelley, and struck the alleged fatal blow under the influence of such fears, and not in a spirit of revenge, and that the defendant had really and in good faith endeavored to decline any further struggle, then the killing was justifiable. 2d. If the jury believe from the evidence that the said Kelley was a mere waiter, cook, or servant, and nothing more, in a public eating-house, and the defendant entered said eating-house as a guest, and was forcibly ejected by said Kelley; that a conflict ensued between the said Kelley and the defendant; that the said Kelley assailed the defendant under circumstances calculated to excite the fears of a reasonable person that she was in danger of then and there receiving serious bodily harm and had endeavored to decline any further struggle, and so struck under the influence of those fears and not in a spirit of revenge, then the homicide was justifiable and the defendant must be acquitted."

As the evidence is not brought to this court, it is necessary for the defendant to show that under no state of proof whatever could these instructions be correct; otherwise we must presume that they were warranted by and applicable to the proofs. Surely it can not be claimed that the first instruction quoted could not be correct under any state of proof. The complaint is that it made it necessary for the defendant to have declined any further struggle before the mortal blow was given. But the proof may have warranted such an instruction; for if the defendant provoked the quarrel or there was a mutual combat between the parties, the killing on the part of the defendant in such case could only be justified by showing that she endeavored to decline any further struggle before she took the life of her antagonist. Statutes of 1861, 60, Sec. 27. For aught that we know, then, this instruction was called for by the proofs, and if so was properly given.

The same objection is urged against the second instruction as the first; and the answer is the same, that under

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some character of proof it would be correct. The deceased Kelley, although he may have been a mere waiter or servant, might have been authorized and justified in ejecting the defendant from the eating-house; he may have been empowered to do so by the proprietor, and the circumstances may have been such as to fully justify his action. In doing his duty in this respect, a struggle may have ensued in which the deceased was killed. If such were the state of proof, then before giving the mortal blow it was incumbent on the defendant to endeavor to decline any further struggle. Whether the evidence warranted the instruction or not we are not able to determine, as it is not before us.

The verdict and judgment must be affirmed. It is so ordered.

THE STATE OF NEVADA, RESPONDENT, v. DANIEL
BAKER *et als.*, APPELLANTS.

CRIMINAL PRACTICE—TIME OF SETTLEMENT OF BILL OF EXCEPTIONS. Section 423 of the Criminal Practice Act, requiring bills of exception to be settled, signed and filed within ten days after trial, is directory; but if not so settled and signed within the time prescribed, some reasonable excuse should be given for the delay.

APPEAL—PAPERS NOT NOTICED UNLESS PART OF RECORD. The Supreme Court will not, on appeal in a criminal case, notice an affidavit made in the court below, unless it be embodied in a bill of exceptions or a statement properly certified.

REFUSAL TO SETTLE EXCEPTIONS TO BE PROPERLY EXCEPTED TO. Where a motion to settle a bill of exceptions in a criminal case was refused on the ground that it was not presented in time and that the affidavit on the motion did not show sufficient excuse for the delay; and on appeal there was no bill of exceptions or statement embodying such affidavit: *Held*, that the Supreme Court could not regard the affidavit or consider whether it showed sufficient excuse or not.

CLERK'S MINUTES OF PEREMPTORY CHALLENGES NOT PARTS OF RECORD. The Criminal Practice Act does not require the clerk to make any minutes of peremptory challenges; and if he does make such minutes, they will not be considered as parts of the record or reviewed on appeal, without a bill of exceptions.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

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This was a prosecution for the crime of robbery, alleged to have been committed by robbing J. N. Johnson on November 5, 1870, in Elko County, of \$2992 50, the property of Wells, Fargo & Co. There were four persons charged in the indictment: Daniel Baker, Leander Morton, Daniel Taylor, and George Lee. Baker, Morton and Taylor were tried together in January, 1871; convicted as charged, and sentenced to imprisonment in the State prison for the term of thirty years. The document purporting to be a transcript on appeal contained copies of various minute entries and, among other things, copies of a notice of motion to settle a bill of exceptions, which was refused, and of the affidavit upon which such motion was founded, but no bill of exceptions or statement of any kind.

The minute entries stated in detail that defendants had peremptorily challenged five jurors, giving their names, and proceeded: "Attorney for defendants then peremptorily challenged W. A. Kindred, which was overruled by the court on the ground that the defendants had exhausted their challenges, no more challenges being allowed for defendants. Attorney for the defendants excepted to the ruling."

The affidavit on motion to settle the bill of exceptions was that of one of defendants' attorneys, giving as an excuse for not presenting the bill for settlement within ten days after trial that he had been compelled to be absent and to leave the matter of such exceptions in the hands of his associate; that such associate had neglected it, and that defendants themselves had been informed and supposed that every thing necessary had been done.

The appeal was from the judgment, and was instituted by and on behalf of defendant Daniel Taylor alone.

Ellis & King, for Appellant.

I. The court below erred in refusing to sign and settle the bill of exceptions tendered by appellant. Section 423 of the Criminal Practice Act, requiring the bill of exceptions to be settled, signed, and filed within ten days after trial of the cause, is purely directory; and where sufficient

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excuse exists and is shown for the failure to do so, the bill should be signed. *People v. Lee*, 14 Cal. 510; *People v. White*, 34 Cal. 183; *People v. Kahl*, 18 Cal. 432; *People v. Woppner*, 14 Cal. 437. The affidavit shows sufficient excuse.

II. The record to be made up in all criminal cases upon conviction had, is required to include "a copy of the minutes of any challenge which may have [been] interposed to the panel of the trial jury, or to an individual juror, and the proceedings thereon." Crim. Pr. Act, Sec. 451. The record here shows that four or not to exceed five peremptory challenges were permitted or exercised by defendants. The correctness of the record is presumed upon both principle and authority.

As now the copy of the minutes must show *any* challenge interposed to a juror and the proceedings thereon, so it must show *every* challenge; and as what is embraced in this record in the way of copy of minutes is required to be a copy of the original minutes, the presumption in favor of the regularity and correctness of the record and of the proceedings of the clerk, has the effect of showing that the original minutes state any and every challenge exercised by and allowed to defendants. Where only four, or at most five, peremptory challenges are thus shown by the record to have been used or allowed, this court will presume that the others, if any, belonging to the party, were not used or allowed. *Fleeson v. Savage*, 3 Nev. 157. We therefore claim that it is conclusively shown from the record that defendants exercised and were allowed to use five peremptory challenges and no more; that they interposed an additional one to a juror, who afterwards served upon the jury, and that the same was overruled and denied.

III. Defendants having been indicted and tried for the crime of robbery, the punishment of which may extend to imprisonment in the State prison for life, were entitled to ten peremptory challenges. Stats. 1864-5, 404; *Dull v. The People*, 4 Denio, 91.

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L. A. Buckner, Attorney General, for Respondent.

I. Although section 423 of the Criminal Practice Act is only directory to the judge, the defendant must prepare his bill and tender it within the time designated in the statute or such additional time as may have been granted to him by a judge. *People v. Lee*, 14 Cal. 510.

II. But the foregoing question is not necessary to be considered here for the reason that there is no bill of exceptions, none having ever been settled or signed by the judge. There is no appeal from the order of the judge refusing to sign the bill, nor anything in the record of which the court can take notice.

III. The proceedings on a peremptory challenge are oral and no where in the code required to be placed in the minutes of the court. If, therefore, the clerk does put such proceedings in the minutes he does not thereby make them a part of the record. Nor can they be made record in any other way than that pointed out by the code, namely, a bill of exceptions. The case is precisely analagous to that where, in a civil case, the clerk spreads the evidence on his minutes, yet it has frequently been decided it does not make it a part of the judgment roll. *Dawley v. Hovious*, 23 Cal. 103. Not being a part of the record they will not be reviewed by the court. *Sharp v. Daughney*, 33 Cal. 505.

IV. Challenges are of two kinds to an individual trial juror; first, peremptory; second, for cause. Both may be oral, but the challenge for cause "must be entered on the minutes of the court," (Criminal Pr. Act, Sec. 342,) and thereby becomes a part of the record. Not so the peremptory challenge. No reason for that need be alleged. The mention of the necessity for spreading the challenge for cause on the minutes, and the statement that the peremptory challenge may be oral and is not required by the code to be put on the minutes excludes the idea that it is required to be put in the minutes.

V. How many peremptory challenges a defendant on trial for robbery in this State is entitled to interpose, is a ques-

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tion of law and may in a proper case be determined by the court; but how many the appellant interposed on his trial is a question of fact, of which this court can only learn by a bill of exceptions.

VI. The district court is a court of record, and the presumption is that defendant used all the peremptory challenges he was entitled to, if he desired to do so, until he shows from the record affirmatively that he did not and that he was prejudiced thereby.

By the Court, LEWIS, C. J.:

The errors relied on by the defendants in this case can not be considered by this court for the reason that there is no record which can be looked into properly bringing them up.

The statute, section 423 of the Criminal Practice Act, makes it necessary that bills of exceptions be settled and signed by the judge and filed with the clerk of the court within ten days after the trial of the case, unless further time be granted by the judge who presided at the trial, or one of the judges of the supreme court. This section, it is true, has been held to be directory, and correctly so; but if not so settled and signed within the time some reasonable excuse should be given for the delay. So it is held under a similar statute. *People v. Lee*, 14 Cal. 370. Where there is a good reason or excuse for the delay or failure in preparing and presenting the bill for settlement, the showing should be made to the court below, and the judge should be liberal in securing to the accused in such case all the advantages which the law awards to him. In this case the court below denied the application to settle the bill after the expiration of the proper time, giving as a reason therefor that no sufficient cause had been shown or excuse given for the delay. What the excuse was we are not permitted to determine, for the affidavit made in support of the motion is not so brought to this court as to enable us to look into it. An affidavit, it is true, appears among the papers

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brought up, but there is nothing in the record to identify it as being the one upon which the motion was made, or showing that it was ever used for that purpose. It comes to this court as a detached paper. It is not embodied in or made a part of what is claimed to be the bill of exceptions, or in a statement of any kind. We know of no way by which an affidavit made in a criminal case can be brought to the attention of this court from the court of *nisi prius*, except by embodying it in a bill of exceptions or a statement properly certified. How is this court to know that the affidavit in question was the one presented to the court below, or that the motion to settle the bill of exceptions was made upon it? We have no evidence of that fact of the character required by the statute. Hence, as the court below refused to settle the bill upon the ground that no sufficient excuse was offered for the delay, and we can not look into the affidavit presenting it to determine whether it was sufficient or not, there is no alternative but to affirm the action of the court below.

But it is argued, the minutes show the error complained of, and as they are made a part of the record they should be reviewed by this court without a bill of exceptions. The minutes, as a matter of fact, do not show the error unless it can be presumed by this court that the clerk made minutes of that which the statute does not require to be so noted. It is undoubtedly true that if the law required the clerk to make minutes of the peremptory challenges and of the proceedings had thereon, it would be a presumption which should control this court that he had fully performed his duty; and therefore if his minutes showed the exercise of only five peremptory challenges by the defendants, and the refusal of the court to allow more when as was the case here they were entitled to ten, the error would be sufficiently shown. But the statute does not require the clerk to make any minutes of the peremptory challenges; on the contrary, as he is expressly required to enter other challenges together with the proceedings had thereon upon the minutes, (Sections 181, 182, 325, 328, 342) the inference is

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that no minute is required to be made of the peremptory challenges, upon the rule that the expression of one thing excludes all others. Now, if these minutes expressly stated that only five peremptory challenges were exercised by the defendants and that the court refused to allow any more, this would not be a sufficient showing of error to authorize this court to consider it, because the minutes so made would be entirely gratuitous on the part of the clerk, unauthorized by statute, and therefore could not be considered as a part of the record to be reviewed by this court without bill of exceptions.

Minutes of challenges not directed by statute to be made are no more a part of the record to be brought to this court than a minute of any other fact or proceeding in court not required to be entered on the minutes. But these minutes show only by inference that the court denied the defendants the right of ten peremptory challenges—that is, they show that they exercised five, but they do not expressly state that no more were allowed.

The judgment must be affirmed.

WILLIAM P. LEAHIGH, APPELLANT, v. E. A. WHITE,
RESPONDENT.

DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE—GRANTEE OF GRANTEE. Where Leahigh contracted with Murphy to purchase a lot from him for \$400; and Bliss having advanced \$300 of the money as a loan to Leahigh at Leahigh's request took a deed of the property in his own name as a security for such loan; and afterwards Bliss sold the lot to White, who, however, had notice of the facts and of Leahigh's claim: *Held*, that under the circumstances White held only as mortgagee and that Leahigh had the right to redeem.

DEED DIRECT TO LOANER OF PURCHASE-MONEY AS SECURITY. If a person loans money to another on the security of a lot to be purchased and takes the deed in his own name to hold as security for the loan, such transaction constitutes a mortgage between them, the same as if the borrower had taken the deed and then made a mortgage to the loaner.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

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The main facts are stated in the opinion. The plaintiff prayed for an accounting as to what was owing by him and as to rents received by defendant; that defendant might be decreed to convey to him upon the payment of any amount that might be found due by him; that if nothing was due, such decree might be absolute; that he might have judgment for any balance found in his favor; and for general relief.

The cause in the court below was submitted to a jury on special issues. Among other findings, one of which is given in the opinion, were the following:

In answer to questions propounded by Plaintiff.

4. Did the defendant White at the time he took the deed for the premises in controversy, or prior thereto, have notice of the transaction between the plaintiff Leahigh and H. Bliss, and of plaintiff Leahigh's equitable interest in the premises?

Answer. Nine jurors find that White did have notice of the transaction between plaintiff Leahigh and H. Bliss. Ten jurors find that defendant White did not have notice of Leahigh's equitable interest in the premises. .

5. Was plaintiff Leahigh in the actual possession of the premises in controversy from on or about February 23d, A. D. 1870, up to May, A. D. 1870; and did he occupy the same until his cabin was rendered uninhabitable by the elements? And was his possession open, exclusive, and notorious during that time? *Ans.* Twelve jurors answer, Yes.

6. Did plaintiff Leahigh in June or July, A. D. 1870, tender to the defendant White the sum of three hundred and twenty-five dollars, gold coin, and demand a reconveyance of the premises in controversy? *Ans.* Twelve jurors find he did tender the money to defendant White. Nine jurors find that he did not demand a reconveyance.

9. Were the circumstances connecting Leahigh with the premises in controversy such as to have put a man of ordinary prudence upon inquiry as to the title or claim of Leahigh to the premises? *Ans.* Nine jurors answer, Yes.

12. Did defendant White, at the time he purchased the lot in controversy, rely or act upon any declaration, assertion

or silence of plaintiff Leahigh, made or omitted to be made by plaintiff Leahigh at the time defendant was on the lot, at about the time of his purchase, in company with B. W. Field and plaintiff Leahigh? *Ans.* Nine jurors answer, No.

Questions by Defendant. 3. Did Leahigh know the fact that White was about to purchase the property; and if he did so know, did he inform the defendant White of any claims that he had to the same, at the time they were on the lot, or at any other time prior to the completion of the purchase? *Ans.* Twelve jurors answer, Yes; he did know of the intended purchase by White the defendant, but did not inform White, the defendant, of any claim he had at the time they were upon the lot. Nine of the jurors find that defendant White was informed of the claims of plaintiff Leahigh, prior to the completion of the purchase. But do not find that Leahigh gave such information.

6. Did plaintiff by his conduct and language on the lot, prior to defendant's completion of the purchase, lead the defendant to believe that he was purchasing a good title, and that he, plaintiff, had no claim upon the same? *Ans.* Nine jurors answer, Yes.

Upon the return and filing of the special findings, defendant moved for judgment thereon; and in response to the motion the court below rendered judgment in favor of defendant dismissing the action and for costs. Plaintiff appealed from the judgment.

H. I. Thornton, for Appellant, discussed the findings; claimed that under them the plaintiff was entitled to judgment, and cited *Willard v. Hathaway*, 27 Cal. 119.

D. W. Perley, for Respondent.

I. Plaintiff did no act to redeem prior to suit brought. He did not tender the full amount necessary to effect a redemption. His tender was in June or July, and did not include interest on the \$325 from April 25th; nor was any

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reconveyance demanded; nor was there any offer to bring the money into court.

II. Bliss never had any right of foreclosure, and no personal debt or obligation of any kind existed as between plaintiff and defendant. Equity could never do such injustice as to construe this a mortgage which plaintiff could redeem but not a mortgage which defendant or his vendor could foreclose. See *Koch v. Briggs*, 14 Cal. 262; *Flagg v. Mann*, 14 Pick. 467; *Glover v. Payne*, 19 Wend. 518; 2 Barb. 29; 3 Leading Cases in Eq. 636; 4 Denio, 493.

It is believed no case can be found where a deed absolute has been allowed to be converted into a mortgage by parol evidence, except as between the original parties to the transaction.

By the Court, LEWIS, C. J.:

This action is brought by the appellant to obtain a decree declaring a certain absolute deed executed by one Bliss to the defendant to be a mortgage and enforcing the plaintiff's right of redemption.

The facts giving rise to this action appear to be these: One J. M. Murphy being the owner of a lot in the town of Pioche on or about the 25th day of February, A. D. 1870, made a parol agreement with the plaintiff Leahigh to sell it to him for four hundred dollars, upon which contract the plaintiff paid one hundred dollars and agreed to pay the balance at the expiration of thirty days; upon the payment of the whole sum Murphy was to execute to him a deed of conveyance. Leahigh under this agreement and by the permission of Murphy entered into possession of the lot. On the 25th of March when the remaining three hundred dollars became due, the plaintiff, not having the money, applied to one Bliss for a loan of the amount, agreeing to allow him to take a deed absolute from Murphy as security for the loan so made. These are the facts as they appear from the plaintiff's complaint; but the defendant alleges that Bliss refused to loan the money to plaintiff, but agreed to pur-

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chase the lot at the amount due Murphy, and to give plaintiff the privilege of buying it back within a certain time at a stipulated price. The money was paid to Murphy and a deed of conveyance executed to Bliss. On the 25th day of May, A. D. 1870, while in possession of the property and claiming it under the deed, Bliss sold and conveyed it for a valuable consideration to the defendant White, who claims that he is a purchaser in good faith and for a valuable consideration without notice and therefore should be protected from the claim now set up by the plaintiff.

No motion for new trial was made, and the only question raised in this court is whether the facts found by the jury warrant the judgment rendered by the court dismissing the bill.

We think judgment should have been rendered in accordance with the prayer of the bill and therefore that the court erred in dismissing it. The findings of fact by which we must be governed in determining this case are all in favor of the plaintiff's claim. It is found that Leahigh entered into the contract with Murphy for the purchase of the lot in question. That the three hundred dollars paid to Murphy on or about the 25th of March, A. D. 1870, was a loan by Bliss to the plaintiff Leahigh. That the deed made by Murphy to Bliss was executed at the request and under the direction of the plaintiff Leahigh, and was given and intended as a security for the loan of the three hundred dollars made by Bliss to the plaintiff. That the defendant White had notice of this transaction between Bliss and Leahigh, and of the latter's claim to the lot, before he received the conveyance from Bliss. There is one finding which upon first impression would appear to contradict this fact of notice; but it can, we think, be very easily reconciled with the finding (which is several times repeated) that White had the notice before his purchase from Bliss was consummated. The finding which appears to be contradictory of such fact reads thus: "Had defendant any notice of Leahigh's claim or of the agreement between him and Bliss prior to or at the time of the purchase of the lot?" The jurors answer, "No."

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As before stated, it is several times repeated in previous findings that before the *consummation* of the purchase he had notice of Leahigh's claim. Now it may be that the jurors understood by the word purchase in the finding above quoted the agreement to purchase; or it may be that they had reference to transactions between Leahigh and Bliss; at least this finding is not so explicit upon the question of notice as to authorize us in saying that it contradicts the others which are very explicit. It will be seen, this finding does not designate the purchase referred to; whether it was the purchase by Bliss from Murphy, (if it may be so called) or the purchase by White from Bliss, is not stated. With such want of explicitness we are not prepared to disregard the very distinct findings that White had notice of Leahigh's claim before the completion of his purchase from Bliss.

Why, then, may not the plaintiff enforce his claim? That he could enforce it against Bliss can scarcely admit of question, for the deed taken by him is found by the jury to be intended as a mortgage, and that is always considered of great importance in determining the question whether an absolute deed is to be held to be a mortgage. It is found that the three hundred dollars advanced by Bliss was a loan to Leahigh, and was not paid as purchase-money. Thus Bliss having a claim against the appellant for the three hundred dollars so loaned and may maintain his action to recover it, and this is proof conclusive that the deed, although absolute, was intended as a mortgage; and thus is presented one of the commonest cases of interference by courts of equity. To prevent fraud and injustice the deed is decreed to be a mortgage as the parties intended it and the privilege of redemption secured. If the action could be maintained against Bliss why not against one who claims from Bliss with full knowledge of the plaintiff's rights? There is no doubt but it can. White stands in the exact position of Bliss, with no greater or better right.

That the deed was executed by and the title passed directly from Murphy to Bliss, instead of passing from Leahigh, can make no difference. Upon the payment of the

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three hundred dollars Leahigh was entitled to the legal title from Murphy, but instead of receiving it he directed it to be conveyed to Bliss as security for the loan. So far as the equitable rights of the parties are concerned they stand in precisely the same position as if Leahigh had first taken a deed from Murphy and then immediately conveyed to Bliss. Bliss received the legal title to which Leahigh was entitled by his direction, simply as a security for a loan. Where the difference, so far as Leahigh's rights are concerned, between such a transaction and the receiving by him of the legal title from Murphy and the immediate conveyance of it to Bliss for the purpose of security? There is none practically or equitably.

The record does not show the amount due from plaintiff to defendant to entitle him to redemption: we can not say therefore that the tender was not sufficient.

Judgment reversed, and the court below directed to render judgment in accordance with the prayer of the bill.

BENJAMIN F. BIVINS v. CHARLES N. HARRIS.

ATTACHMENT SUIT—ORDER UPON DEFENDANT TO DELIVER UP STOCK. Where a defendant in an attachment suit was examined under section 131 of the Practice Act; and on its appearing that his only property subject to attachment consisted of mining stock which he had upon his person, the district judge ordered it to be delivered to the sheriff, to be held subject to the result of the suit: *Held*, that such order was not in excess of the jurisdiction of the district judge.

CONSTRUCTION OF PRACTICE ACT, SEC. 131—EXTENT OF "EXAMINATION." The examination of the defendant, provided for in section 131 of the Practice Act, contemplates the examination of the defendant not only as a witness in a proceeding against a garnishee but in a direct proceeding against himself; and it authorizes a discovery of property concealed upon his own person and an application of it to his just debts.

This was an original application to the Supreme Court for a writ of *certiorari* as stated in the opinion. The affidavit of the petitioner sets forth that the action of *H. F. Rice v. Benjamin F. Bivins* was a suit for the recovery of one thou-

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sand dollars and interest on a promissory note made by Bivins to James W. Nye and by him assigned to Rice; that an attachment was issued to the sheriff in said action on the commencement thereof on November 14, 1872, which however had never been served, levied or returned; that on the same day an order for the immediate examination of defendant before Judge Harris was issued; that he appeared in obedience thereto and that thereupon the orders and proceedings complained of took place, all of which are alleged to have been in excess of his jurisdiction, power and authority and to the injury of affiant and in violation of his rights.

Robert M. Clarke, for Petitioner.

Ellis & King, for Respondent.

By the Court, BELKNAP, J.:

Application for a writ of *certiorari* to review certain orders of the judge of the second judicial district made in attaching the property of the defendant in the case of *Rice v. Bivins*.

Rice sued Bivins in the court below upon a promissory note payable in this State, and upon filing the statutory affidavit and undertaking a writ of attachment was issued. Thereafter the plaintiff filed an affidavit, setting forth that the defendant had upon his person a large amount of money which he refused to apply in settlement of his indebtedness; that aside from the money upon his person the plaintiff knew of no other property of the defendant subject to attachment, and prayed that the defendant might be examined in relation to his property under section 131 of the Practice Act.

Upon the examination of the defendant it appeared that he had upon his person certain shares of the capital stock of the Champion Consolidated Mining and Smelting Company subject to attachment, one thousand shares of which the district judge ordered delivered to the sheriff, to be held subject to the result of the suit. The petitioner complains

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that this order of the district judge was in excess of jurisdiction, and prays that a writ of *certiorari* issue to review the proceedings.

The question of remedy was not discussed by counsel, and we have deemed it proper at their request to waive its consideration, to decide an important question of practice upon its merits.

Section 131 of the Practice Act provides: "Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property containing the amount and description thereof." The two preceding sections define the manner in which credits or other personal property in the hands of third persons or debts due the defendant may be attached and the liability of the garnishee.

Counsel for petitioner contends that these three sections must be considered together, and that the examination provided for in section 131 is for the purpose of discovering property in the possession or under the control of third persons, and does not contemplate property (as in this case) upon the person of the defendant. Had it been the intention of the legislature to provide for the examination of the defendant in relation to his property in the possession of others only, we think language would have been employed restricting the examination to such property.

The law first provides for examination in relation to property in the possession of others, afterwards for the examination of the defendant in relation to his property. "The

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defendant may also be required to attend for the purpose of giving information respecting his property." The words "his property" must here be taken without the previous restriction, and in an enlarged, comprehensive sense. This language contemplates the examination of the defendant not only as a witness in a proceeding against the garnishee, but in a direct proceeding against himself.

The examination is for the purpose of giving effect to the attachment law, and to compel the defendant to give information respecting his property. The evident intention of the legislature was that all of the property of the defendant, not exempt from execution, should be attached, or so much thereof as might be necessary to satisfy the plaintiff's demands. Property upon the person or concealed is not exempt from execution, and the examination provided in section 131 contemplates the discovery of the defendant's concealed property and its application to his just debts. If the property is subject to attachment it is unimportant in whose possession it may be or by whom concealed. An examination of the defendant under oath in relation to his concealed property is a proper and frequently the only method calculated to discover property concealed by himself.

The technical interpretation sought for by petitioner would clearly defeat the intention of the legislature, while to sustain the jurisdiction does no violence to the letter and is justified by the spirit of the law.

Writ denied.

The cause having been argued before HAWLEY, J., took his seat, he did not participate in the foregoing decision.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

JANUARY TERM, 1873.

JOSEPH LEONARD, APPELLANT, *v.* J. F. PEACOCK,
RESPONDENT.

JUDGMENT ROLL IN CERTIORARI CASES. In *certiorari* cases the judgment roll is preserved in the court granting the writ, as in a court of original jurisdiction in an ordinary action, and a copy only of the judgment is sent to the inferior tribunal.

CERTIORARI—NO AFFIRMATIVE ACTION AFTER PROCEEDINGS ANNULLED. If proceedings of an inferior court are annulled on *certiorari*, there is no further positive or affirmative action to be taken by the inferior tribunal.

PROCEEDINGS OF DISTRICT COURT WITHOUT JURISDICTION UTTERLY VOID. Where the proceedings of a district court on appeal from a justice's court were annulled on *certiorari* by the Supreme Court, and afterwards the district court pronounced a judgment in terms similar to that of the Supreme Court and in addition ordered a writ of restitution previously issued to be set aside with costs and directed the sheriff to put the plaintiff out and the defendant or his grantee in possession: *Held*, that the district court having no jurisdiction, its judgment and orders were utterly void.

JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE FINAL. The appellate jurisdiction of the district court on appeal from a justice's court is final (Const. Art. VI, Sec. 6), and no appeal lies from its action as such appellate court.

NO CERTIORARI WHERE APPEAL. *Certiorari* does not lie where there is an appeal.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The plaintiff, as will be seen by reference to the case of *Peacock v. Leonard* on *certiorari*, reported *ante*, p. 84, com-

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menced a forcible entry suit against defendant before a justice of the peace and recovered judgment. Defendant appealed to the district court and on another trial there plaintiff again recovered judgment. Defendant then sued out from the Supreme Court a writ of *certiorari* for the purpose of reviewing the proceedings of the district court; and the Supreme Court adjudged that all the proceedings were void for want of jurisdiction and annulled them. A remittitur in the usual form, entitled in the cause and containing the judgment and opinion of the Supreme Court attached, was transmitted to the district court; upon and after the filing of which certain proceedings adverse to plaintiff took place in the lower court, as stated in the opinion. From these proceedings the plaintiff appealed.

The defendant and respondent then moved to dismiss the appeal.

Haydon & Cain, for Respondent.

Before the decision of the *certiorari* in this court, Leonard, by virtue of a writ of restitution issued by the district court, obtained possession of the premises; that is, he did so on a void execution issued on a void judgment. The court below, after the decision, restored the possession. Every court will restore a possession acquired under its void process, or through abuse of its process. *Winters v. Helm*, 3 Nev. 396; *Reynolds v. Harris*, 14 Cal. 678. When the writ of restitution was issued by the district court, R. V. Borden, who had bought Peacock's rights in and was in possession of the premises, was ousted therefrom. The district court, upon receiving the judgment of the Supreme Court, entered a new judgment dismissing the former judgment as null and void; allowed defendant his costs; and upon Borden's affidavit showing his ouster, restored him to the possession so taken away from him by such void judgment and execution.

However the court may look at the proceedings in this case, it is apparent that they are proceedings in the same case originally commenced in the justice's court and appealed to the district court. No sophistry can make out that any

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new suit was initiated or that the judgment for costs or order restoring defendant or his assignee to the premises is not a judgment and order in the case which arose in justices' court. That being a case on appeal from a justice's court, the action of the district court was final and no appeal lies from it. Constitution, Art. VI, Sec. 6. If the district court had jurisdiction to dismiss, then the allowance of costs and restitution to possession can only be questioned as error. If it had no jurisdiction to allow costs or restore to possession, the remedy is by *certiorari*.

1. B. Marshal and Webster & Knox, for Appellant.

This is not a cause which arose in a justice's court, but had its origin in the district court. The cause of *Leonard v. Peacock*, which is referred to in the notice of motion to dismiss, was annulled and declared void—nullified, abrogated, abolished, obliterated—by the judgment of this court upon *certiorari*; and no action of the district court can galvanize that cause into life.

The court below assumes to make the cause so annulled the basis of action, but such assumption can not change the facts. The foundation of the proceedings from which this appeal is taken is the petition or affidavit of Borden, and the motion for judgment for \$304 37 costs and for an order of restitution of the premises, made in the district court. They were distinct proceedings from that of *Leonard v. Peacock*, with a new party in the place of Peacock. In the case which had been annulled, the district court could take no action except to file the remittitur transmitted to it from this court. Instead however of doing so, under pretense of acting in that cause but really assuming jurisdiction of a new cause in an irregular manner, it went on and rendered final judgment for costs against appellant and made an order depriving him of his real estate.

The order as well as the judgment is appealable. *Gray v. Schapp*, 4 Cal. 185; *Hastings v. Burning Moscow Co.* 2 Nev. 93; *Burgoyne v. Holmes*, 3 Cal. 50; *Kitttridge v. Stevens*, 23 Cal. 283. Leonard had possession and right to the premises, of

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which he could not be deprived by the summary measures resorted to in the court below. But those measures were taken in a court of general jurisdiction, and the order has gone forth from that court commanding its officers to remove him from his property and place another in possession, and his substantial rights have been affected thereby.

Certiorari is not the proper remedy here, because an appeal lies. An appeal lies from a final judgment for more than \$300 and in cases where the right to real estate is involved. Const. Art. VI, Sec. 4; Stat. 1869, 248, Sec. 330. A judgment or order appealed from, although void, will be corrected on appeal. *Hustings v. Burning Moscow Co.* 2 Nev. 93; 22 Barb. 271; 6 Gray, 343; 2 Hill, 657; *Gray v. Schapp*, 4 Cal. 85; *Lander v. Coe*, 5 Cal. 230. Any judgment, order or decree which puts an end to the proceedings may be appealed from. *Hill v. Young*, 3 Nev. 339; *Kittridge v. Stevens*, 25 Cal. 283.

By the Court, WHITMAN, C. J.:

In *Peacock v. Leonard*, ante, p. 84, it was held upon *certiorari* that the court of the justice where the suit was brought and the district court to which it was appealed had each and both exceeded their jurisdiction; and the judgment of the court was "that the proceedings had and judgment entered in the above entitled cause by the district court of the second judicial district in and for Washoe County, State of Nevada, be and the same are hereby annulled and set aside."

By statute it is provided in such case that "a copy of the judgment, signed by the clerk, shall be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified up"; and that "a copy of the judgment, signed by the clerk, entered upon or attached to the writ or return shall constitute the judgment roll." * * Practice Act, Secs. 444 and 445. Thus it will be seen that the judgment roll is preserved in the court granting the writ, as in a court of original jurisdiction in an ordinary action, and a copy only of the judgment is sent to the inferior tribunal.

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Upon the rendition of the judgment the proceedings reviewed are presently affirmed, annulled, or modified as it may go. If annulled, there is no further positive or affirmative action to be taken by the inferior tribunal. As in the case of *Leonard v. Peacock*, the district court had assumed appellate jurisdiction of the case: upon the judgment of this court, its action was simply erased. The copy of the judgment notified the world of the fact and nothing remained for the district court to do.

The record in this case, however, shows that the district court pronounced a judgment in terms similar to that of this court, and in addition ordered a writ of restitution issued and served pending the review to be set aside and adjudged void, with costs of the whole matter from justice's court up and down against plaintiff. A notice was after ordered upon plaintiff "to show cause why a writ should not issue restoring the property (real estate) to defendant." Plaintiff made showing of various matters, among others a claim of paramount title; and upon affidavits and arguments pro and con an order was finally made directing the sheriff to put plaintiff out of possession and place one Borden, defendant's grantee or assignee as it is phrased, in quiet and peaceable possession of the disputed premises.

From the judgment and subsequent order this appeal is taken. There is no room for doubt as to the action of the district court. It is utterly void. In a case where as an appellate court—and only thus was it acting or professing to act—it had no jurisdiction of subject-matter or person, it assumed to do all that could have been done with full jurisdiction of both. It is objected, however, that no appeal lies, because the appellate jurisdiction of the district court in cases arising in justices' courts is final. So it is provided by the constitution of this State, and that is conclusive of this case; for the record discloses no attempt on the part of the district court to exercise original jurisdiction; it simply exceeded its appellate jurisdiction. The proceedings were wholly in and about the case of *Leonard v. Peacock*, on

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appeal from a court of a justice, and so the district court acted.

Certiorari does not lie where there is an appeal. The writ was granted in the case of *Peacock v. Leonard ante*, 84, for that reason; and in that case the conduct of the district court was, prior to the review, *mutatis mutandis* the same as after. The motion to dismiss must prevail. It is so ordered.

JOHN C. LYNCH, RESPONDENT, *v.* ELIZA LAWSON,
APPELLANT.

IN EJECTMENT ON PRIOR POSSESSION, SUCH POSSESSION MUST BE SHOWN. In case of a judgment in ejectment for plaintiff, where he relies upon prior possession alone, if the testimony fails to show any act of possession such judgment will be reversed.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

This was an action of ejectment to recover possession of the easterly sixteen inches of lot eleven in block one of McCannon's survey of the town of Pioche, in Lincoln County, and \$500 damages for alleged unlawful detention. Plaintiff relied upon prior possession. The testimony tended to show that there had been several surveys; that the first might have been made by measuring on the uneven surface of the ground; that the last was on a horizontal plane; and that the sixteen inches in controversy might, according to the first survey, have been a portion of lot twelve belonging to defendant, and not a portion of lot eleven according to the last survey. There was no testimony showing any particular possession of the land in controversy on the part of the plaintiff.

To the testimony of the surveyors as to the surveys and maps, defendant objected on various grounds, and among others that they were not official. The objections were overruled. There was a verdict and judgment in favor of plaintiff for restitution of the premises sued for and one

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dollar damages. A motion for a new trial having been overruled, defendant appealed from the judgment and order.

Pitzer & Corson and A. B. Hunt, for Appellant.

The verdict is not supported by any evidence. No proof of any title from paramount source was given, of any description. No proof of actual prior possession of the sixteen inches in controversy was given. The testimony of Surveyors Wandell and Mason, both of whom were plaintiff's witnesses, fails to establish that defendant's building was on any portion of lot eleven, but conclusively proves that it was not on said lot and not within several feet of the east line of said lot. Hence there is no evidence to sustain the verdict. The defendant being in the actual possession of the ground on which her building stood was *prima facie* the owner. The verdict of the jury giving to plaintiff the sixteen inches on which a portion of said house stood was, according to the testimony of the surveyors who were plaintiff's witnesses, not controverted by any other witnesses, was clearly against evidence and law, and ought not to stand.

Wm. W. Bishop, for Respondent.

No brief on file.

By the Court, WHITMAN, C. J.:

Respondent claimed under no strict title, and never had any such possession as would warrant recovery even as against at respasser. The law in this State is well settled and needs no iteration upon this point. *Robinson v. The Imperial Silver Mining Company*, 5 Nev. 44.

Again, the evidence of the surveyors (conceding for this decision that it was properly admitted) shows, if it shows any thing, that appellant is within the lines of her own lot as originally run, and no authority appears for a change. The judgment and order denying a new trial are reversed and cause remanded.

Vansickle v. Haines.

PETER W. VANSICKLE, APPELLANT, v. JAMES W.
HAINES *et als.*, RESPONDENTS.

APPEAL FROM JUDGMENT UPON REMITTITUR NOT ENTERTAINED. Where the Supreme Court on appeal reversed a judgment for plaintiff and ordered judgment for defendant; and the court below upon the filing of the remittitur entered judgment for defendant in strict compliance therewith: *Held*, that an appeal from the latter judgment would not be entertained.

APPEAL from the District Court of the Second Judicial District, Douglas County.

Upon the filing of the remittitur issued out of the Supreme Court upon and in accordance with its judgment and decision in *Vansickle v. Haines*, 7 Cal. 249, the court below entered a judgment "pursuant to the instructions of the Supreme Court, that the prayer of said plaintiff's complaint be denied and that said plaintiff have nothing by his said action herein, and that said defendants James W. Haines, Wm. N. Leet and Charles H. Van Gorder do have and recover of and from said plaintiff Peter W. Vansickle their costs in this action taxed at five hundred and sixty $\frac{40}{100}$ dollars in United States gold coin, and that the right and title of the said defendant James W. Haines to all the waters of said Daggett Creek, the stream of water in controversy, and his right to have the same flow continually, uninterruptedly and undiminished to, through, over and upon his said land and in its natural channel upon said land, be and the same is hereby fully confirmed and settled."

From this judgment the plaintiff appealed.

Robert M. Clarke, for Appellant.

Mesick & Wood, for Respondents.

By the Court, WHITMAN, C. J.:

In the original case entitled as above, the district court was directed to enter decree for respondents. *Vansickle v. Haines et als.*, 7 Nev. 249. It appeared from the opening statement of counsel that the mandate had been strictly obeyed; consequently no further argument was allowed,

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upon the ground that the case was finally disposed of and that to hear an appeal would be to review the action of this and not of the district court—an unheard-of practice, except upon a rehearing granted, in which case the final judgment is stayed. Such is the uniform holding of courts of last resort. *Chickering v. Failes*, 29 Ill. 294; *Cumberland Coal and Iron Co. v. Sherman et al.*, 20 Md. 117; *Miner v. Medbury*, 7 Wis. 100; *Fortenbery v. Frazier et al.*, 5 Ark. 200.

The appeal is dismissed.

THE VIRGINIA AND TRUCKEE RAILROAD COMPANY, APPELLANT, v. JOHN HENRY *et al.*, RESPONDENTS.

CONDEMNATION OF LAND FOR RAILROADS—"DAMAGES TO RESIDUE OF PREMISES."

Although the statute in reference to making compensation for lands condemned for railroad purposes (Stats. 1864-5, 427, Sec. 30) does not, technically speaking, allow for damages to the residue of premises from which a portion only is taken, yet such damages are a proper element of estimate in arriving at the "just compensation" which must be awarded to the owner of the land taken.

CONDEMNATION OF LAND—VERBAL ERRORS IN COMMISSIONERS' REPORT. Where a

report of commissioners appointed to appraise land condemned for railroad purposes allowed a round sum for "the value of said ground appropriated and the damage to the remainder of the premises by reason of the severance of the part taken," etc.: *Held*, that though "damages to the remainder" were not a matter of distinct allowance, yet, as they were an element of estimate in arriving at a "just compensation" for the land actually taken, the error of the report, being one of form rather than of substance—of expression rather than of real meaning, would not vitiate it.

"COMPENSATION FOR LAND TAKEN" IS NOT MERE "MARKET VALUE." The statute providing for "compensation" and "damages" to be awarded for lands condemned for railroad purposes (Stats. 1864-5, 427, Sec. 30) does not contemplate the giving of the mere "market value" of the land taken; and if it did it would in that regard be unconstitutional.

MEANING OF "JUST COMPENSATION." The word "just" in the constitutional provision that private property shall not be taken for public use without "just compensation" (Const. Art. I, Sec. 8) is used evidently to intensify the meaning of the word "compensation"—to convey the idea that the equivalent to be rendered shall be real, substantial, full and ample.

STATUTE OF TWO CONSTRUCTIONS. When the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save it.

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"VALUE" SWORN BEFORE ASSESSOR NOT EVIDENCE OF VALUE ON CONDEMNATION. The valuation which a person puts upon his property before an assessor for taxation purposes, though it may perhaps be admissible by way of contradiction of the owner's testimony to the contrary, has no weight, and is in fact incompetent as independent evidence in determining the value of such property on proceedings for condemning it for railroad purposes.

COMPENSATION FOR LAND TAKEN—"SPECIAL INJURY TO BUSINESS" IRRELEVANT. Upon an inquiry as to the compensation to be awarded a person whose property is condemned for railroad purposes, testimony as to special injury to such person's business is irrelevant.

OBJECTIONS TO TESTIMONY BEFORE COMMISSIONERS. Upon a proceeding before commissioners to appraise the compensation to be paid for private lands taken for railroad purposes, if improper or irrelevant testimony be introduced, timely objection thereto should be made or no advantage can be taken of the error.

REPORT OF COMMISSIONERS—OMISSION OF TESTIMONY. Though it is good practice for commissioners on proceedings for the condemnation of land for public uses to present with their report all the testimony, as suggested in *Virginia and Truckee R. R. Co. v. Lovejoy*, 8 Nev. 100, it is not vital error not to do so, and especially when the omitted testimony appears to have been immaterial.

MODE OF ESTIMATION OF COMPENSATION FOR LAND TAKEN. The compensation to be paid the owner of land taken for railroad purposes is most readily and fairly ascertained by determining the value of the whole land without the railway and of the portion remaining after the railway is built—the difference being the true compensation to which the party is entitled.

POWERS OF COMMISSIONERS. Commissioners appointed to appraise the compensation to be paid the owner of property taken for public uses are not on questions of fact confined and limited as a jury: though they hear and weigh the allegations and testimony offered, they themselves view the premises and are supposed to exercise their own judgment to some extent, irrespective of the evidence adduced.

"GOOD CAUSE" TO SET ASIDE COMMISSIONERS' REPORT. The "good cause" for which the statute provides a report of commissioners appointed to appraise compensation for land taken for railroad purposes may be set aside, (Stats. 1864-5, 427, Sec. 31) means something clear and indubitable, pointing error in law or fact, intentional or unintentional on the part of the commissioners.

VIRGINIA AND TRUCKEE R. R. Co. v. ELLIOT, 5 NEV. 353, on the point that the decision of commissioners in estimating the compensation to be paid for lands taken for railroad purposes will not be set aside if there be any substantial testimony to support it, affirmed with a view of settlement of question.

APPEAL from the District Court of the First Judicial District, Storey County.

This was a proceeding under the statute of March 22, 1865, providing for the incorporation of railroad companies and the management of the affairs thereof, (Stats. 1864-5, 427) to condemn certain land in the town of Gold Hill in

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Storey County, for the purposes of a side track. The land taken was the west half of lot 5 in block 2 of range "E" of said town, all of which lot was described in the petition as belonging to or claimed by the defendants John Henry and Mary Henry, his wife. Commissioners having been appointed by the district judge in accordance with law, they duly met and heard the allegations of the parties and the testimony offered. Among other evidence, the defendants testified that they had a boarding and lodging-house and were keeping cows and selling milk on the premises, and that the taking of one half of the lot by the plaintiff was a serious injury to their business,—to the introduction of which evidence before the commissioners no objection appears to have been taken. The other evidence related principally to the value of the lot before the railroad was built and the value of the remaining portion after the railroad had appropriated the part taken, which was about thirty-six feet by twenty-five. In their report the majority of the commissioners awarded compensation in the sum of one thousand dollars—the third commissioner being willing to award only five hundred and fifty.

The plaintiff being dissatisfied moved to set aside the report and for a new trial on the various grounds noticed in the opinion. The motion was denied and the report confirmed. Plaintiff appealed from the orders refusing to set aside and confirming the report.

Mesick & Wood, for Appellant.

I. There was error in allowing compensation for damages caused by the severance of the land appropriated from the residue of the land owned by defendants. The statute does not provide for or allow any such damage. Compensation can be awarded "only for the land sought to be appropriated." The province of the commissioners is simply to determine the compensation for the land appropriated; with the question of damages from severance they have nothing to do; and to give them power to do anything else would be to confer upon them an authority not warranted by the statute.

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An examination of the cases cited to sustain the action of the commissioners will show that the statutes of the various states under which those decisions were made conferred much more extended power than does that of Nevada; and we are unable to find any decision giving to commissioners any such authority as is claimed for them in this case unless the authority was found in the statute under which they were appointed. See *Hatch v. Vermont Central Railway*, 25 Vermont, — Redfield's Supplement to Law of Railways, 300.

II. It is admitted that the commissioners failed to report a very considerable portion of the testimony; but it is objected that it was the duty of petitioner to move to amend the report. The answer is simple. The statute (Sec. 31) only authorizes one motion, that is to set aside the report and have a new trial, which was the motion made. It seems plain that the report should have been set aside on account of its imperfect character; for the reason that, as the district court is constituted the tribunal before which the review shall be had, in order that such court may be in a position to fully and fairly consider and determine the matter and have before it all the facts necessary to such consideration, the statute requires the commissioners to file "their report signed by them setting forth their proceedings in the premises." The legislative intent must have been that the report should set forth all the proceedings necessary to a complete understanding of the merits of the case. *Virginia and Truckee R. R. Co. v. Lovejoy*, ante, 100; *C. P. R. R. Co. v. Pearson*, 35 Cal. 258.

J. A. Stephens, for Respondents.

I. The statute requiring the commissioners to file their report setting forth their proceedings in the premises does not imply that they are to report all the testimony taken before them. While it may be the better method to do so, there is nothing compulsory; minutes of the testimony are sufficient. *C. P. R. R. Co. v. Pearson*, 35 Cal. 258.

II. If material testimony given before the commissioners

was omitted in their report, the proper method to pursue was to obtain an order of the court requiring them to certify the remainder as an amendment to their report, or otherwise ; and if it could not be obtained it would then be good cause for setting aside the report. *C. P. R. R. Co. v. Pearson*, 35 Cal. 259; *Thompson v. Parker*, 3 Johns. 260; *Caffely v. Keeler*, 12 Wend. 290. But the testimony which appears by the affidavits to have been omitted was irrelevant and immaterial. *C. P. R. R. Co. v. Pearson*, 35 Cal. 262; 40 Pa. State, 53.

III. Where a party seeks to set aside an award of commissioners the burden of proof is upon him to clearly satisfy the court of any alleged mistake and that he was prejudiced thereby; and also to show that if the mistake had not occurred the award would have been different. *Tomlinson v. Tomlinson*, 3 Iowa, 575; *Knox v. Symonds*, 1 Vesey, 369; *Bushnel v. Marsh*, 17 How. 344; *McKenney v. Western Stage Co.*, 4 Iowa, 420.

IV. The statute, in making it the duty of the commissioners to ascertain what benefits or advantages the owner of the land will derive by reason of the construction of the railroad, means, of course, the benefits or advantages to the remainder of the land left after taking a portion; for if all were taken there would be nothing left by which he could derive a benefit or advantage, and in that case the market value of the land would be the compensation to be paid. This shows that the commissioners are to look beyond the bare abstract value of the strip or portion of land to be taken. The difference between the value of the whole tract before the construction of the road and the value of the portion left after the road has been constructed, is the true compensation to which the party is entitled, as held in California. *San Francisco A. & S. R. R. Co. v. Caldwell*, 31 Cal. 375; Hitt. Gen. Laws of Cal. 855; *Troy and Boston Railroad Co. v. Lee*, 13 Barb. 169; 16 Barb. 273; 16 Barb. 68; 47 Pa. 29; 2 Za. 495; 4 English L. and Eq. 265; 37 Pa. St. 469; 43 Pa. St. 495; 29 Ind. 536; 26 Texas, 588; 11

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Minn. 515; 2 Q. B. 630; 7 Harris, 192; 8 Barr, 445; 3 Casey, 252; 9 Casey, 56, 426.

We are unable to find any authority upholding the doctrine that the owner is compelled to accept the value of the portion of his land taken only, and resort to an action against the company for damages by reason of the severance to the remainder.

By the Court, WHITMAN, C. J.:

This appeal is from the order of the district court confirming the report of commissioners appointed to ascertain and assess the compensation to be paid respondents for lands to be taken by petitioner for its use; and from the order denying a new trial.

Appellant's main objection is to the allowance by the commissioners of damages to the residue of the premises, from which a portion was taken; and it is strenuously insisted that the proper construction of the statute of this State forbids such allowance. Technically, yes, so far as the ultimatum of the report is concerned; and the one under review is awkwardly expressed when it finds "that the value of said ground appropriated by them and the damages to the remainder of the premises of defendants by reason of the severance of the part taken is," etc.; but as the damage to the residue of a tract of land from which a portion is taken for public use is always an element of estimate in arriving at the compensation for the land taken, there is no substantial error. It is of form rather than of substance, of expression than real meaning. It is no such error in principle as should vitiate the report. So, for all that, it should stand. *Troy and Boston R. R. Co. v. Lee*, 13 Barb. 169.

Says the statute: "The said commissioners shall proceed to view the several tracts of land as ordered by said court or judge, and shall hear the allegations and proofs of said parties, and shall ascertain and assess the compensation for the land sought to be appropriated to be paid by said company to the person or persons having or holding any right,

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title or interest in or to each of the several tracts of land; and in ascertaining and assessing such compensation they shall take in consideration and make allowance for any benefit or advantages that in their opinion will accrue to such person or persons by reason of the construction of the railroad as proposed by said company; and if the said railroad company shall, in their petition filed in said special proceedings, offer or agree to make good and sufficient fences on the line of their said railroad or any portion thereof, or to make good and sufficient cattle-guards where fences may cross said line of railroad, at such places and such times as the same may be necessary, no sum or price for such fences shall be included in the compensation or damages to be awarded by said commissioners." Stats. 1864-5, pp. 439-40.

Upon this language, although the words "compensation" and "damages" are used, of course in the received and construed sense, petitioner insists that the measure thereof is filled by giving the private person the market value of the land taken. If such was the intention of the legislature, apt language has not been chosen to express it; and if such language had been used as of necessity clearly expressed such intention, then the act in that regard would have been opposed to the constitutional provision of the United States and of this State forbidding the taking of private property for public use without "just compensation," and not only so but to the practice either of written or unwritten law of every civilized people. Upon principle and precedent the proposition is monstrous. While the law does and should provide in proper case for the surrender to the public use of individual property, so that no stay shall impede the general necessity, on the other hand it must jealously guard the rights of individual owners. They are never to be remitted, as counsel suggests, to litigation for all matter of loss save the naked market value of the property taken, but no part of their property shall be taken without just compensation "first made or secured." It is difficult to imagine an unjust compensation; but the word "just" is used evidently to intensify the meaning of the word "compensation;"

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to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the constitution. So are all the decided cases. While courts have differed upon minor points, two of which the statute of this State settles, namely, the allowance for particular benefit derived from the construction of the railroad and the exclusion from the calculation of damages of the cost of necessary cattle-guards and fences where the petitioner offers to construct; yet upon the great substantial underlying basis, upon which only can arise a constitutional law for the taking private property for public use—the absolute protection of the individual by just compensation—there has been, could be, no dispute. *Bigelow v. West Wis. R. R. Co.*, 27 Wis. 478; *Memphis and Charleston R. R. Co. v. Payne*, 37 Miss. 700; *Walther v. Warner*, 25 Mo. 277; *Meacham v. Fitchburg R. R.*, 4 Cush. 291; *Swan v. Williams*, 2 Mich. 427; *Aldridge v. The Tuscumbia R. R. Co.*, 2 Stewart and Porter, (Ala.) 199; *Johnson v. Joliet and Chicago R. R. Co.*, 23 Ill. 203; *O'Hara v. Lexington R. R. Co.*, 1 Dana, 232; *Woodfolk v. Nashville and Chattanooga R. R. Co.*, 2 Swan, 422; *Wilmington & Reading R. R. v. Stauffer*, 60 Pa. State, 374; *Cleveland and Pittsburg R. R. Co. v. Ball*, 5 Ohio State, 568; *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *Winona R. R. Co. v. Waldron*, 11 Minn. 515; *Tide Water Canal Co. v. Archer*, 9 Gill & Johnson, 480; and so on, *ad infinitum*. As has been said, there is not, nor could there be, any well considered case to the contrary.

In the case first above quoted occurs the following remarks applicable here: "Several witnesses were also allowed to testify, under like objection, as to how much less the remainder of the quarter section was worth at the time the land was taken by the defendant than the whole quarter section would then have been worth had the same not been taken. The objection to the foregoing testimony is predicated upon the peculiar language of the charter of the defendant, providing for condemning land for its railroad, etc. The charter simply makes provision for an appraisement and award

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of the value of the land taken, and is entirely silent on the subject of compensating the owner for any damage which may result to him in case such taking of his land depreciates the value of his other lands lying contiguous to that so taken and being part of the same tract. B. and Local Laws of 1863, Ch. 243. It is urged that this language distinguishes this charter from nearly all of the railroad charters which have been granted by the legislature of this state; and that while under such other charters the owner of the land taken may recover compensation for the damages to his whole tract, by reason of the taking of a portion of it, he can only recover in a case arising under the charter of the defendant the mere naked value of the land actually taken, without regard to the effect of such taking upon the balance of his lot or farm. * * * *
After a careful consideration of the subject, I am impelled to the conclusion that the construction of its charter for which the counsel for the defendant has so earnestly and ably contended, is untenable. He concedes, if I understand him correctly, that had the charter provided for making compensation to the owner of the land taken or for assessing his damages, under the authorities the rule would have been otherwise. I think it is not difficult to demonstrate that the terms 'assessing the value of the land taken' and 'making compensation to the owner for the land taken,' mean the same thing. Section 13, Article I, of the constitution of this state provides, that 'the property of no person shall be taken for public use without just compensation therefor.' Under this restriction the state may, in the exercise of its right of eminent domain, appropriate to public use the private property of the citizen. In respect to the land taken from the plaintiff, the state has delegated or has attempted to delegate to the defendant this high attribute of its sovereignty. But the defendant takes the power subject to the restriction, or it does not take it at all. Unless the law which purports to confer the power to take the land provides for just compensation to the owner thereof, it is in violation of the constitutional restriction, and therefore void. Hence, unless

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the provision of the charter of the defendant for 'assessing the value of the land taken' is equivalent to one giving the owner 'just compensation for the land taken,' the charter in that respect is void, and the company have no power to take land for any purpose, without the consent of the owner thereof. It must be assumed that the legislature intended to confer upon the defendant a valid power; and if so, the conclusion is irresistible, that by the terms 'value of the land taken' it meant just compensation to the owner for the land which it empowered the defendant to take. It requires neither argument nor reference to authorities to show that when the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save the statute. An application of this rule to its charter defeats the construction for which the counsel for the defendant contends, and saves to the defendant the powers therein granted. Inasmuch as the defendant has taken private property pursuant thereto, it cannot justly complain if we give to the charter a construction which will save the rights thus asserted under it. We hold therefore that the provision of the defendant's charter by virtue of which the land of the plaintiff was taken, entitles him to just compensation therefor." pp. 484-5-6-7.

It is next objected that the report does not show the proceedings had, in that it fails to disclose material testimony received. There is conflict upon affidavits filed as to what the omitted testimony in fact was; but, accepting the petitioner's version as entirely correct, it could in no view of the case have been material. Henry, one of the defendants, testified that he swore his property before the assessor at much less than he valued it before the commissioners. As to the estimate for taxation, unfortunately too common a course! but one which could have no weight in determining the value of the property in question, incompetent in fact for that purpose though perhaps admissible to tend to contradict his testimony in chief; if any stress was given that,

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there should have been none as the evidence was entirely irrelevant, basing as it does the claim for compensation mainly upon the fact of special injury to respondent's present business. This is not the rule. *Whitman et al v. Boston and Maine R. R.*, 3 Allen, 133. The same is true of Mrs. Henry's testimony; but if, perchance, the commissioners were influenced by the statements of either or both, it is petitioner's own fault; it should have made timely objection, and the record shows none.

The cross-examination of Cooper, Brown, Butler and Robinson did not vary their direct testimony. So while the intimation made in *Virginia and Truckee R. R. Co. v. Lovejoy*, ante 100, as to the propriety of presenting all the testimony to the court suggests good practice and might well be followed, it is no vital error not to do so, especially when such is immaterial as in the case at bar. The district court has power to order in the testimony, and in a proper case would undoubtedly do so; here there was no call for an order. The district court saw that there was substantial testimony to sustain the award and that all such said to have been omitted could not touch the issue.

The only evidence in point came from Winterbauer, Cooper, Robinson and Fraser. This was based upon or approximated the basis of the rule, which is clearly summed up by a text writer thus: "It has been said the appraisers are not to go into conjectural and speculative estimations of consequential damages, but confine themselves to estimating the value of the land taken to the owner. This is most readily and fairly ascertained by determining the value of the whole land without the railway and of the portion remaining after the railway is built. The difference is the true compensation to which the party is entitled." Redfield on the Law of Railways, Sec. 71, Sub. 3.

Winterbauer fixes the value of the whole property before the severance at two thousand dollars, after at five or six hundred; Cooper at twenty-five and twelve; Robinson at sixteen and twelve; Fraser at fifteen and eleven; making, as will be seen, the various estimates of compensation fourteen,

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thirteen, and four hundred dollars. The commissioners found one thousand. Here was a conflict of testimony, but no such conflict as of itself would warrant a district court in setting aside the verdict of a jury because against the weight of evidence. It must be remembered that these commissioners are not on questions of fact confined and limited as a jury. They hear and weigh the allegations of the parties; they view the premises, and are supposed to exercise their own judgment to some extent, irrespective of evidence; and into their conclusions enter elements of calculation which it is hard to estimate, but which are of sufficient importance to deter a district court, even in absence of statutory prohibition, from lightly setting aside a report so made. Under the statute, it can only be done "upon good cause shown therefor." What that good cause shall be can with safety be held something clear and indubitable, pointing error in law or fact or both, intentional or unintentional on the part of the commissioners. *Piper's Appeal*, 32 Cal. 530; *St. Louis and St. Joseph R. R. Co. v. Richardson*, 45 Mo. 466.

Such is not the case here. As this court said in another case and iterates now, which affirmance it is hoped may be regarded as a settlement of the question: "If it be admitted that the testimony reported in the record preponderates against the conclusion of the commissioners on this point, it cannot be said, in any view that may be taken of it, that the preponderance is so great and decided as to justify an interference with the report. There is testimony decided and substantial in support of it; and furthermore under the statute the commissioners are required to examine or view the land themselves, which was done in this case; and thus their opinion of its value is added to the testimony of the witnesses on behalf of the respondent. Under such circumstances the decision of the commissioners will not be set aside if there be any substantial testimony to support it. Such is the rule repeatedly announced, and we think uniformly followed. * * This case very clearly comes within the rule, and hence the report cannot be disturbed." *The Virginia and Truckee R. R. Co. v. Elliot*, 5 Nev. 358.

Lyon County v. Washoe County.

The orders of the district court refusing a new trial and confirming the report of its commissioners are affirmed.

LYON COUNTY, APPELLANT, v. WASHOE COUNTY,
RESPONDENT.

SERVICE BY MAIL, WHEN COMPLETE. Where an affidavit of service of copy of notice of appeal by mail stated that it was deposited in the post-office at Dayton on a certain day, directed to the proper person to be served at Carson and postage paid: *Held*, that the service, if proved at all, was a service on the day of such deposit.

NOTICE OF APPEAL MUST BE FILED BEFORE COPY SERVED. To render an appeal effectual the filing of the notice of appeal must precede or be contemporaneous with the service of the copy: otherwise that which purports to be a copy fails as such for want of an original to support it.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

This was an action to obtain a decree declaring certain territory near the north-east corner of Storey County within the boundaries of the plaintiff, Lyon County, and not within the boundaries of the defendant, Washoe County. The case was tried in the court below before a jury, which returned a verdict for defendant. Judgment was accordingly entered to the effect that the disputed territory was within the limits and subject to the jurisdiction of Washoe County, and for \$2798 85 costs.

The plaintiff gave notice of appeal as stated in the opinion. The defendant moved to dismiss.

Robert M. Clarke, for Respondent.

John Powell, Jr., for Appellant.

By the Court, BELKNAP, J.:

The respondent moves to dismiss the appeal. One of the reasons assigned for the motion is that the copy of the notice of appeal was served before the notice of appeal was filed with the clerk of the district court.

Groves v. Tallman.

The only evidence of service of a copy of the notice of appeal is contained in the following affidavit of John Powell, Jr.: "—— that on Sunday, June 18th, 1871, according to his best recollection and belief, he deposited at the post-office at Dayton, Nevada, a copy of said notice of appeal and a copy of said proposed statement on appeal, directed to R. M. Clarke, Esq., attorney, etc., Carson, Nevada, and paid the postage thereon. * * *" If any service is proven by this affidavit it is on June 18, 1871. The transcript shows that the notice of appeal was filed June 19, 1871. It is well settled, that to render an appeal effectual the filing of the notice of appeal must precede or be contemporaneous with the service of the copy: otherwise that which purports to be a copy fails as such for want of an original to support it. *Buffendeau v. Edmondson*, 24 Cal. 94; *Moulton v. Ellmaker*, 30 Cal. 527; *Boston v. Haynes*, 31 Cal. 107; *Foy v. Domec*, 33 Cal. 317; *Lynch v. Dunn*, 34 Cal. 518. It is ordered that the appeal be dismissed.

W. H. GROVES, APPELLANT, v. SAMUEL TALLMAN *et al.*,
RESPONDENTS.

COMPLAINT TO DISSOLVE PARTNERSHIP—EXECUTED PARTNERSHIP AGREEMENT TO BE ALLEGED. Where a complaint for dissolution of a partnership alleged that on a certain day the parties were partners doing a certain business and owning the property and entitled to share the profits and losses in a certain ratio; but there was no allegation of any executed partnership agreement between them: *Held*, on demurrer, that such complaint did not state facts sufficient to constitute a cause of action.

ULTIMATE FACTS SHOWING PARTNERSHIP AS BETWEEN PARTNERS. As between partners the ultimate facts whence a partnership is deduced are first, the agreement, and second, its execution; summed up as the executed agreement: there can be no partnership between parties, so far as they solely are concerned, without a consent thereto and fulfillment thereof.

ALLEGATION OF PARTNERSHIP IN ACTION TO DISSOLVE. In a suit to dissolve a partnership: *Held*, on demurrer, that the allegation that the parties were partners was an allegation of a conclusion of law.

APPEAL from the District Court of the Fifth Judicial District, Nye County.

Groves v. Tallman.

This was an action against Samuel Tallman and J. N. Groves, administrator of the estate of James M. Groves, deceased, for a dissolution of the partnership of Tallman & Groves and an accounting and settling up of its affairs. The complaint alleged the partnership as set forth in the opinion. Defendant Tallman demurred on the grounds: 1—That said complaint does not state facts sufficient to constitute a cause of action; 2—That there is another action pending between the same parties for the same cause; 3—That there is a defect and misjoinder of parties defendant. Defendant Groves demurred on the first and third grounds above stated and the additional one that the court had no jurisdiction of the person of said defendant. The demurrers were sustained and time given plaintiff to amend, which being declined, judgment was entered for defendants. Plaintiff appealed.

H. Mayenbaum, for Appellant.

The partnership was sufficiently alleged. 1 Estee's Pleadings, 337, 340, 342, 556—Forms, Nos. 68, 69, 70, and 202; 2 Van Santvoord's Pleadings, 361, 362; Collier on Part. Sec. 673; 16 Abb. 286; 25 N. Y. 470.

The ultimate facts, not the evidence of the facts, must be alleged in the pleadings. 16 Cal. 242; 23 Cal. 169; 31 Cal. 272.

Geo. R. Williams, for Respondents.

By the Court, WHITMAN, C. J.:

To the bill of appellant a demurrer was sustained, and judgment had on failure to amend, whence this appeal.

Only one point of demurrer can be noticed, as only one is properly taken, "that the complaint does not state facts sufficient to constitute a cause of action." These are the allegations of the bill, to which the demurrer is directed: "That on the 21st day of August, 1871, and for a long time prior thereto, the said defendant Samuel Tallman, and the said James M. Groves and W. H. Groves were partners, doing business under the firm name of 'Tallman & Groves,'

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and were carrying on the business of merchandising and other business at the said town of Belmont, County of Nye aforesaid. That the property, assets, profits and losses of the said partnership were owned and divided as follows, to wit: the said Samuel Tallman owned and was entitled to one half part or share of said partnership property, assets and profits, and was liable and responsible for one half of the losses and debts of the said partnership. That the said James M. Groves and W. H. Groves each owned and was entitled to one quarter part or share of the said partnership property, assets and profits, and was liable and responsible for one quarter of the losses and debts of said partnership."

The appellant contends that he has pleaded sufficiently in that he has pleaded the ultimate facts. There is his mistake: the pleading is rather a compound of conclusions of law and probative facts, which it is somewhat difficult to separate.

As between partners, the ultimate facts whence a partnership is deduced are—first, the agreement; second, its execution; summed up as the executed agreement. There can be no partnership between parties, so far as they solely are concerned, without a consent thereto and fulfillment thereof. There may be an agreement without execution, in which case no partnership arises save by decree of specific performance, or there may be an apparent execution by acts and circumstances, which as to the world would show and thereby create a partnership but as between the parties raise none, although a partnership agreement may be implied as well as express.

"It should be added, that whether two or more persons are partners as to each other, must generally and perhaps always be determined by the intention of the parties as the same is expressed in the words of their contract, or may be gathered from the acts and from all the circumstances which are available for the interpretation or construction of the contract." *Parsons on Partnership*, 59; *Chase v. Barrett*, 4 Paige, 148; *Hazard v. Hazard*, 1 Story, 371.

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Now, the agreement between the parties to this bill is nowhere stated. It may be inferred, and probably in absence of demurrer the pleading might have stood as a defective statement of fact. *Treadway v. Wilder*, ante, 91.

The conclusion of a partnership is alleged, and that property was owned, losses shared, and profits divided in a certain ratio. In the absence of any express agreement, such of these as are facts would tend to prove, uncontradicted would prove, a partnership between the parties; but in the absence of any express agreement so to own, share and divide, or in the face of an express agreement to the contrary, they might be susceptible of explanation.

The ultimate fact to be proven between partners is the executed agreement; that of course may be shown in various ways. From that proven ultimate fact, the aggregation perhaps of many, the law draws the inference of partnership. *Dwinel v. Stone*, 30 Me. 384; *Everett et al. v. Chapman et al.*, 6 Conn. 347; *Terrill v. Richards*, 1 Nott & McCord, 20; *Daggett v. Jordan*, 2 Fla. 541.

This ultimate fact is not averred in the present bill. The legal inference is drawn, and probative acts and circumstances alleged. This is not a statement of facts sufficient to constitute a cause of action; the very gist is omitted. So the demurrer was well taken, and the judgment of the district court is affirmed.

ROBERT M. CLARKE *et al.*, RESPONDENTS, *v.* LYON
COUNTY, APPELLANT.

SUPREME COURT DECISIONS—IMPLIED ADJUDICATION OF QUESTION OF JURISDICTION. Where among other objections properly raised and argued on appeal from a judgment, it was urged that the court below had no jurisdiction, which question however the Supreme Court did not specially notice but decided the appeal on other points and remanded the case for a new trial: *Held*, that as the question of jurisdiction was preliminary in its character and the reversal had been placed upon other grounds, the action of the Supreme Court amounted to an adjudication that the objection to the jurisdiction was untenable.

ACTION AGAINST COUNTY IN OTHER JUDICIAL DISTRICT. The statute prescribing the manner of commencing an action against a county and providing that it

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"may be commenced in the district court of the judicial district embracing said county," (Stats. 1864, 45) does not prevent the bringing of such an action in another judicial district, subject to the right of defendant to a change of venue.

ACTION AGAINST COUNTY—JURISDICTION—CHANGE OF VENUE. An action against a county is a civil suit; and in the absence of any special provision of statute to the contrary it is governed by the same rules of practice applicable to other civil suits in reference to jurisdiction and change of venue.

ACTION AGAINST COUNTY IN OTHER DISTRICT—WAIVER OF CHANGE OF VENUE. Where a county was sued in a judicial district of which it did not form a part, but it appeared and answered without presenting any objection to the jurisdiction: *Held*, that it thereby waived its right to a change of venue and trial in its own judicial district.

RATIFICATION OF ACT OF UNAUTHORIZED AGENT. If a principal, upon a full knowledge of all the circumstances, deliberately ratify the act of an unauthorized agent, he will be bound thereby as fully as if the agent had been expressly authorized to do the act.

POWER OF COUNTY COMMISSIONERS TO EMPLOY EXTRA COUNSEL. The statute creating boards of county commissioners, in authorizing them "to control the prosecution and defense of all suits to which the county is a party," (Stats. 1864-5, 257, Sec. 8) confers upon them the power to employ counsel in such suits other than the district attorney, and as a consequence to ratify the act of an unauthorized agent in employing such counsel.

ALLOWANCE BY COUNTY OF FEES OF "EXTRA COUNSEL," WHEN RATIFICATION OF UNAUTHORIZED EMPLOYMENT. Where Clarke & Wells, having performed legal services for Lyon County under an unauthorized employment by the district attorney in a suit pending against it, presented their bill of \$5000 therefor to the county commissioners; and it appeared that such commissioners with a knowledge of all the material facts and after full discussion upon the merits deliberately recognized the performance of the services for the county and allowed \$400 as a fair compensation therefor: *Held*, that such action amounted to a ratification of the unauthorized employment by the district attorney, and that by such ratification the county became bound to pay what the services were reasonably worth.

OBJECTIONS NOT CONSIDERED WHEN NOT PROPERLY PRESENTED. The Supreme Court will not consider an objection to a judgment against a county, based on the ground that the claim had not been presented to the county auditor for allowance or rejection, if such objection does not appear to have been made in the court below and is not set forth in the assignment of errors on appeal.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action by Robert M. Clarke and Thomas Wells, composing the law firm of Clarke & Wells, to recover \$5000 for legal services performed by them on behalf of defendant in defending the suit of *The Virginia and Truckee Railroad Company v. Lyon County*, in May and June, 1870,

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which case was here on a former appeal and will be found reported in 7 Nev. 75. After that decision, the action having been remanded, a second trial took place in the court below—upon which as appears from the opinion the facts were more fully presented—and resulted in a verdict and judgment in favor of plaintiffs for \$5000—a larger amount than had been awarded on the former trial. A motion for a new trial having been overruled, defendant appealed from the judgment and order.

Mitchell & Stone, for Appellant.

I. The action should have been dismissed. The statute prohibits the institution and maintenance of any suit against a county in any judicial district other than the one in which it is situate. The words “may be commenced” mean “must be commenced.” Stats. 1864, 45; *Lehigh County v. Kleckner*, 5 Watts & Sergeant, 181; *Lyell v. Board of Supervisors of St. Clair County*, 3 McLean, 580; 7 Mass. 187; *Gillman v. Contra Costa County*, 8 Cal. 57; 4 Gilman (Ill.) 20; 50 Ill. 506; 31 Ill. 543; 5 Cow. 188; 5 John Ch. 111; 34 Cal. 290; 5 Cal. 290; 6 Blackford, 125; 3 Comstock, 9; 33 Cal. 217.

II. There was no evidence showing or tending to show a contract or any ratification of a contract by defendant. The evidence showed without conflict that the allowance made by the commissioners was a mere gratuity, and was so declared to be by said commissioners at the time of the allowance. *Ward v. Williams*, 26 Ill. 447; 26 Wend. 226; 2 Hill, 175; *Yellow Jacket Co. v. Stevenson*, 5 Nev. 225; *Clarke & Wells v. Lyon Co.*, 7 Nev. 79; *Zottman v. San Francisco*, 20 Cal. 102; 26 Wend. 494.

III. The instruction is erroneous. It makes the allowance of \$400 conclusive proof of the ratification of the contract of employment made by Gates, provided the jury believe from the evidence the commissioners were acquainted with all the material facts of such employment. Such a proposition is not law, and it ignores the testimony introduced by both plaintiffs and defendant tending to explain

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the allowance as contained in the minutes of the board and showing that such allowance was a gift or gratuity and not a ratification.

IV. Plaintiffs failed to prove a legal allowance or rejection by the officers of the county of any portion of their claim, and hence no *prima facie* case was made to go to the jury. There is no proof that plaintiffs ever presented their claim to the auditor for approval or allowance, and the allowance by the commissioners alone was not sufficient to constitute a ratification of any contract. *Champion v. Sessions*, 1 Nev. 482.

Robert M. Clarke, for Respondents.

I. The evidence shows that Gates notified the commissioners that he had employed plaintiffs; and it is clear such employment was for the county and that the commissioners knew it. Their allowance under these circumstances of part of the demand amounted to a ratification and rebuts the presumption of gratuity; and in ratifying the employment the commissioners bound the county to pay what the services were worth.

II. The court below had jurisdiction of the subject-matter and by answering the defendant submitted itself or its person to the jurisdiction. The Practice Act, Sec. 21, is equally applicable to counties and individuals; so that if a county be sued in the wrong place, it, like an individual, must apply to have the venue changed before "the time for answering has expired" or submit to the jurisdiction. 50 Ill. 506.

III. The statute relating to suits against counties does not create a special remedy or new forum, but simply authorizes suit against a county. The forum is the district court and the proceedings are to be the same as those in the case of an individual as prescribed by the Practice Act. Stats. 1864, 45.

IV. The objection that it does not appear from the record that the demand was presented to the auditor is not well

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taken. It is nowhere specified as ground of objection, nor is it assigned as error in the record.

By the Court, HAWLEY, J.:

An opinion was rendered at the October term, 1871, of this court, reversing this case upon the ground of error of the district court in refusing to give a certain instruction asked by defendant. *Clarke et al. v. Lyon County*, 7 Nev. 75. A new trial in the district court resulted in plaintiffs obtaining judgment for \$5000. Sec. 1 of the act prescribing the manner of commencing and maintaining actions by or against counties provides that "actions against a county may be commenced in the district court of the judicial district embracing said county" (Stats. 1864, 45), and it is claimed by appellant that under this section Lyon County [defendant] could not be sued in any other district than the one where it is situated; in other words, that this suit having been commenced in Ormsby County in the second judicial district court (which does not embrace Lyon County), the district court had no jurisdiction.

It would be a sufficient answer to this objection to state that the same question was properly presented in the record and argued by counsel upon the former hearing of this case. If the objection to the jurisdiction was valid it would be a final determination of this suit adverse to plaintiffs; and it is not to be presumed that the Supreme Court would have rendered an opinion reversing the case on other grounds, while entertaining the opinion that the district court had no jurisdiction to try the case. The mere fact that the reversal of the case was placed on other grounds is conclusive that the Supreme Court then entertained the opinion that the objection to the jurisdiction of the district court was untenable. But inasmuch as this point has been elaborately argued and ably presented by appellants' counsel, we deem it proper to express our views upon the question.

The act prescribing the manner of commencing actions by or against counties was evidently passed for the express pur-

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pose of giving the power to sue counties—a right which did not exist at common law—and it simply provides that such actions “may be commenced” in certain courts and specifies the manner in which the original process shall be served.

An action against a county is a civil suit and all the proceedings had therein, in the absence of any special provision in the act giving the right to sue, are to be governed by the provisions of the Civil Practice Act. Sec. 21 of this act provides, that “if the county designated for that purpose in the complaint be not the proper county, the action may notwithstanding be tried therein unless the defendant before the time for answering expire demand in writing that the trial be had in the proper county.” The defendant when served with process appeared and answered plaintiffs’ complaint without presenting any objection to the jurisdiction of the court, thereby waiving its right to avail itself of the privileges given in said section.

If the defendant desired to have the place of trial changed to the proper county, it should have made demand in writing at or before the time for answering. *Reyes v. Sanford*, 5 Cal. 117; *Pearkes v. Freer*, 9 Cal. 642. Upon such application being made, the court would have been compelled to change the place of trial. *Williams v. Keller*, 6 Nev. 144; *Watts v. White*, 13 Cal. 324.

In *McBane v. The People, ex rel Stout*, 50 Ill. 506, the question of the application of the Civil Practice Act to suits brought against counties was fully discussed. It was there held that the suit must be brought in the county specified in the statute; and the question then arose whether a suit against a county, properly brought, could be taken by a change of venue to a different county. Justice Walker, in delivering the opinion of the court, after citing the provisions of the statute of that state relating to change of venue, says: “It will be observed that the language of this section is comprehensive, and embraces the parties to any civil suit. And it is obvious that an action against a county is a civil cause; and it is equally plain that the plaintiff and defendants are parties to it; and it follows that they are em-

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braced within the provisions of this law, nor do we find any exceptions as to any class of persons or civil causes, and no reason is shown why such parties or causes are not as fully within the reason of the provisions of this law as other parties." This decision is applicable to the facts of this case and is, in our judgment, conclusive of the question under discussion.

Appellant next claims that the district court erred in giving the following instruction: "If the jury believe from the testimony that on or about the 23d day of May, A. D. 1872, [1870] one William M. Gates was the acting district attorney of Lyon County in this State, and that in a proceeding in the Supreme Court entitled 'The State of Nevada *ex rel.* William Sharon against the Board of County Commissioners of Lyon County' the said district attorney employed the plaintiffs as attorneys and counsellors at law to appear and act for and on behalf of the said County of Lyon, and defend such action at law, without stipulating any fixed amount of compensation, and that at said time these plaintiffs were duly acting and licensed attorneys at law, and that pursuant to such employment these plaintiffs in good faith and in behalf of said Lyon County did appear and render valuable legal services as averred in the complaint, and that in such action the County of Lyon was actually a party in interest, and that these plaintiffs regularly and according to form of law did thereafter present to the board of county commissioners of said Lyon County a bill against said county for the sum of \$5000, as the alleged value of such services; that said board of commissioners or a majority of the three commissioners were fully acquainted with all the material facts pertaining to such alleged employment and the alleged services rendered, and that under the light of such knowledge the said board of commissioners in due form and at a regular session of the board did consider and pass upon the merits of such bill and did allow thereon the sum of \$400, and that such allowance as recorded upon the minutes of such board was absolute and unconditional and unreserved in form, then such action on the part of said commissioners

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was in law a ratification of the alleged employment of plaintiffs by the said district attorney, and such ratification became binding upon this defendant, Lyon County; and the defendant, Lyon County, became liable to these plaintiffs for the reasonable value of any legal services so rendered by these plaintiffs, and your verdict in such case will be for the plaintiff, and you will state in your verdict such sum, not exceeding \$5000, as you find from the testimony to be the value of such services."

It is a principle of law too well settled to require a citation of authorities that when the principal upon a full knowledge of all the circumstances deliberately ratifies the acts of an unauthorized agent he will be bound thereby as fully as if the agent had been expressly authorized to do the act.

The real questions to be decided are: first, whether the commissioners had the power to ratify the unauthorized act of the district attorney of Lyon County in employing plaintiffs to assist him in the trial of the case referred to in said instruction; second, if the commissioners had the power, is the testimony sufficient to show a ratification?

The first part of this question is readily answered in the affirmative. The statute of this State makes it the duty of the board of county commissioners "to control the prosecution or defense of all suits to which the county is a party," (Stats. 1864-5, 259, Sec. 8,) and it has been decided in California under a similar statute that the commissioners have the power to employ counsel other than the district attorney. *Hornblower v. Duden*, 35 Cal. 664. It follows, that having the power in the first instance to employ counsel, the commissioners had the power to ratify the unauthorized act of the district attorney in employing plaintiffs to assist him in the suit of *The Virginia and Truckee Railroad Co. v. Lyon County*. *Zottman v. San Francisco*, 20 Cal. 105; *The People ex rel. Alexander v. Swift*, 31 Cal. 26.

Did the commissioners ratify the unauthorized act of the district attorney? This was the question upon which the case was decided when first before this court, and is the one upon which it must now be determined. For a proper solu-

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tion of this question it must be borne in mind that when the case was first before this court, "there was not," to quote the language of Lewis, C. J., "a scintilla of testimony to show that the commissioners knew of any contract between the district attorney and plaintiffs at the time they made the allowance." The opinion delivered by the C. J. was unquestionably correct upon the state of facts then presented. The present record exhibits an entirely different state of facts. It clearly appears from the testimony that while considering the bill of \$5000 presented by plaintiffs and before taking final action thereon, the commissioners sent for the district attorney (Gates) and were by him fully advised of the entire transaction. Gates explained the manner and purpose of his employment of plaintiffs, and also stated the character of the services rendered by the plaintiffs. The commissioners knew they had never employed plaintiffs, or in any manner authorized the district attorney to employ them. They knew that plaintiffs had rendered legal services in the suit of The Virginia and Truckee Railroad Co. v. Lyon County, and were aware of the exact position of all the parties. It was within their power to reject the claim *in toto*. But with knowledge of all the material facts, and after full discussion upon the merits of the bill, they deliberately allow plaintiff \$400. Why? Because the commissioners knew, as testified to by the witness Keith, "that Clarke had performed some services and they were willing to pay him what they were worth and would allow \$400." This allowance can not be considered, as claimed by the learned counsel for appellant, a gratuity. The order was unconditional. It may have been and doubtless was intended by the commissioners as full compensation for the services rendered by plaintiffs. But it was a recognition upon the part of the commissioners that plaintiffs had rendered legal services for and on behalf of Lyon County, and amounted to a ratification of the unauthorized employment of plaintiffs. By such action the commissioners bound Lyon County to pay plaintiffs whatever amount their services were reasonably worth; and that question, owing to a difference of opinion between

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the commissioners and plaintiffs, has been submitted to and determined by the jury.

Viewed in the light of all the evidence contained in the present record, we think the instruction given by the court was fully supported by the evidence, that it correctly stated the propositions of law, and was not calculated to mislead the jury.

The other objection urged by appellant that plaintiffs can not maintain their suit because the claim, after the allowance of \$400, was not presented to the county auditor for approval or rejection, will not be considered; because the objection does not appear to have been made in the court below, and is not set forth in the assignment of errors on appeal. *Corbett v. Job*, 5 Nev. 204; *Meadow Valley Mining Co. v. Dodds*, 6 Nev. 264.

The judgment of the court below is affirmed.

PETER DALTON, RESPONDENT, *v.* JOHN S. BOWKER,
APPELLANT.

MEASURE OF DAMAGES ON BREACH OF WARRANTY OF TITLE. In case of a breach of warranty of title of real estate, where there has been no fraud or concealment, the measure of damages is the value of the property at the time of sale, to be ascertained by the purchase-money, with interest thereon and the costs expended in defense of the title; and when the eviction is partial, the damages will be apportioned to the measure of value between the property lost and the property preserved.

DAMAGES ON WARRANTY, FOR EVICTION—"PRESENT VALUE" NOT RELEVANT. In a suit for breach of warranty of title, an instruction which directs the jury to consider the value of the property lost at the time of trial as the measure of damages, is error.

WARRANTY OF TITLE—EVIDENCE OF EVICTION AND OF SUPERIOR TITLE. In an action for breach of warranty of title, the judgment roll in a previous action by the same plaintiff against the evictors in which he failed to recover the premises warranted, is admissible in evidence as against any person who was neither party nor privy to it only for the purpose of showing an eviction: it is not even *prima facie* evidence that such eviction was by title paramount.

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BREACH OF WARRANTY OF TITLE—VOUCHER OF WARRANTOR. In case of warranty of title, where there has been an eviction, the party evicted upon suing the evictor may notify his warrantor of the commencement of such action and require him to assist in its prosecution; and in such case the warrantor will be bound by the proceedings; but to have such effect the notice should be unequivocal, certain and explicit; and a mere notice before suit of an intention to sue and to insist upon the warranty is not sufficient.

WARRANTOR OF TITLE MAY BE VOUCHERED TO PROSECUTE EVICTOR. When the vendor of land with warranty of title is properly notified of the pendency of an action by the vendee to recover it from an evictor and afforded an opportunity to assist in the prosecution, he becomes in effect the real party in interest; the same as if the vendee were the defendant in the action and the vendor were vouched to defend.

CONSTRUCTION OF DEED OF LAND "AND ALSO PRIOR RIGHT TO USE" WATER. Where a deed conveyed a tract of land "and also the prior right to use for irrigation and other farming purposes the one-half of the waters of Thomas Creek, the natural channel of which is situate in and through the above described land," and warranted "the title to said land and the use of said water": *Held*, that the water right warranted was not the mere right of a riparian owner, which would have passed by a deed of the land; but that the language employed and the use of the word "also" meant something in addition to the land and its incidents.

RIGHT TO USE OF WATER AS DISTINCT FROM LAND. Running water, as long as it continues to flow in its natural channel, can not be made the subject of private ownership except as a right incident to property in land; but a right may be acquired to its use by appropriation, which will be regarded and protected as property.

MEANING OF WORD "ALSO" IN DEED. The word "also" as used in a deed granting specific land "and also" a right which is not necessarily an incident of such land, implies something in addition to the land.

IF ONE PARTY TESTIFY TO CONVERSATION, THE OTHER PARTY MAY ALSO TESTIFY TO IT. In an action between the grantor and grantee of a deed, where it is a material question which of several streams was meant by the conveyance of a right to use the waters of "Thomas Creek": *Held*, that if plaintiff testify to any conversation between himself and defendant relative thereto, defendant has a right to state his recollection of what was said and testify in regard to the same conversation.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The facts are stated in the opinion. The appeal was by defendant from the judgment and an order overruling his motion for new trial.

Marshall & Blair, for Appellant.

I. The only estate conveyed by the deed from Bowker to Dalton is that described in the granting part thereof, and

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any covenants therein can only apply thereto. All after the granting clause in reference to the waters of Thomas Creek is mere surplusage and adds nothing to the effect or force of the deed either explanatory or otherwise. It does not amount to a grant of a water right, and conveys no more than the riparian rights naturally belonging, appurtenant and incident to the land granted. *Crosley v. Parker*, 4 Mass. 110; *Corbin v. Healy*, 20 Pick. 514; 4 Kent, 467.

II. No latent ambiguity in the deed is shown and parol testimony in relation thereto was inadmissible. The court could not legally assume the existence of a latent ambiguity. 2 Kent, 720, note c.; 1 Greenleaf, Sec. 297, *et seq.* But if the court was right in admitting testimony of plaintiff to explain the deed in any respect, it was clearly wrong in excluding the testimony of the defendant upon the same point.

III. Even if plaintiff sustained damage, it was damage without injury; because it is shown by the testimony that the property conveyed by Bowker to Dalton was and is worth much more than the purchase-price thereof, exclusive of all water and water rights whatsoever. And it is well settled that the measure of damages upon covenants of warranty is the purchase-price with interest. 4 Kent, 529-531, and cases there cited. But in this case the verdict was for the *value*, not the *purchase-price* paid. And necessarily so under the instructions of the court below.

IV. Bowker could not be affected by the judgment or decree in the case of *Dalton v. Libby & Lamburth*, because that was only in relation to waters of Thomas Creek above, out of and beyond the land conveyed by Bowker to Dalton and to which his deed can by no construction be made to apply; for there is no grant of water or a water right except such as necessarily may have been incident and appurtenant to the land granted.

V. The notice served on the defendant on April 14, 1871, was insufficient, as no suit had then been commenced and none was commenced until on or after April 24. Such a notice to be effective must be distinct and unequivocal and expressly require the party bound by the covenants to

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appear and defend the adverse suit. Rawle on Covenants for Title, 229-257.

VI. Upon the failure of title in a specific part only of the subject of the sale, as in this case, the purchaser can recover only a portion of the price paid in a ratio to the amount of the part from which he was evicted, or the proportion which it bears to the price of the amount of the purchase-money. *Morris v. Phelps*, 5 Johnson, 56; Rawle on Covenants for Title, 90-91, 319-322; *Demmick v. Lockwood*, 10 Wend. 142; *Whitney v. Dewey*, 15 Pick. 428; *Catlin v. Hurlburt*, 3 Vt. 403.

Haydon & Cain, for Respondent.

I. The deed from Bowker to Dalton conveyed an unrestricted right to use one half the waters of Thomas Creek by priority anywhere on, above or below or on either side, for irrigation and other farming purposes, without any limitation of its use to the land conveyed. It mentions merely as a description of the Thomas Creek intended to be conveyed, that it is the Thomas Creek the natural channel of which is "situate in and through the above described land." *McDonald v. Bear River Co.* 13 Cal. 220; *Ripley v. Welch*, 23 Cal. 452; *Morris v. Becknell*, 7 Cal. 261; *Davis v. Gale*, 32 Cal. 34. Defendant did not purport to convey in his deed a right as riparian owner—that would have passed as an appurtenance. Irrigation, except to a very limited amount, is not a riparian right. *Vansickle v. Huines*, 7 Nev. 249. See also, *Ophir Co. v. Carpenter*, 4 Nev. 153; *Lobdell v. Hall*, 3 Nev. 516; *Lobdell v. Hall*, 2 Nev. 277.

II. The point urged that as Bowker was not a party to the suit of *Dalton v. Libby & Lamburth* he was not bound by it, is subversive of the whole doctrine of suits on covenants of warranty. Acts of trespass, it is true, make no breach of such covenants; but when in a suit commenced to eject an evictor he pleads and maintains a superior adverse title, he shows by adjudication that he is no trespasser but a lawful claimant. The decree in *Dalton v. Libby & Lamburth* was conclusive that they lawfully claimed three-fifths

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of the one-half of the waters of Thomas Creek, conveyed and warranted to Dalton. See 2 Greenleaf, § 244.

III. The notice by Dalton to Bowker was abundantly sufficient to put Bowker on his industry to maintain the title conveyed by him. Dalton could not compel him to sue; but as, if Libby and Lamburth, the persons whom he afterwards sued, remained in possession five years he would lose his right to the water and his recourse on the warranty, it was incumbent on him to commence suit. See 1 Abbott's Forms, 344.

IV. The point that the estate granted was the land and not the water, because only the land is mentioned in the granting clause of the deed, is clearly in misapprehension of what the granting clause in a deed means. The prior right to use half the waters of Thomas Creek for irrigation and other farming purposes is granted by and in the granting clause or part of the deed. The deed first grants the land and then grants the use of the water before the appurtenance clause, by the use of the word "also," without repetition of the words "bargain, sell, grant and convey."

By the Court, HAWLEY, J.:

This was an action upon a covenant of warranty. It appears from the testimony that on May 4, 1870, appellant Bowker conveyed to respondent Dalton a quarter section of land. After a proper description of the land, the following language is inserted in the deed, viz: "also, the prior right to use for irrigation and other farming purposes the one-half of the waters of Thomas Creek, the natural channel of which is situate in and through the above described land." By a covenant contained in said deed, Bowker "warrants the title to said land and the use of said water, and will defend the same against all persons lawfully claiming either said land or water."

On the 14th day of April, 1871, Wm. Libby and Thomas Lamburth diverted all the water flowing down the natural

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channel of the stream which passed through the land conveyed to Dalton, so as to deprive him of the use thereof either for "irrigation or farming purposes." On the same day (April 14, 1871) Dalton served upon Bowker the following notice: .

"Reno, Washoe County, April 14, 1871.

John S. Bowker, Esq. * * You are hereby notified that Wm. Libby and Thomas Lamburth have on this day * * deprived me of the use of all the water of Thomas Creek running down through the farm sold and conveyed by you to me, to wit: [Here follows a description of the land]; and you are hereby notified that I shall commence suit against said Libby and Lamburth to determine the title to said water to the extent of one-half of said creek, and that I shall hold you to your warranty of the title to me to the use of one-half of the water of said Thomas Creek and to your covenant to defend the same against all persons lawfully claiming said water. * * Peter Dalton."

On the 21st day of April, 1871, Dalton commenced an action against said Libby and Lamburth in the district court of Washoe County, to recover "one-half of the waters of Thomas Creek," alleging that the natural channel of the creek "runs through the land" conveyed to him by Bowker. Said cause was tried, and resulted in a decree from the court that plaintiff [Dalton] was entitled to two-fifths of all the waters of Thomas Creek, described in his complaint, and that defendants [Libby and Lamburth] "were entitled to the other three-fifths of the one-half of the waters of said Thomas Creek."

The present suit was commenced by plaintiff [Dalton] to recover of defendant [Bowker] the damages alleged to have been sustained by reason of defendant's failure "to warrant the title to said water." Plaintiff obtained judgment for \$975 and costs Defendant appeals.

Upon the trial of the case the court gave the following charge to the jury: "If the jury believe from the testimony

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that this plaintiff purchased by deed for a valuable consideration from the defendant the 'prior right to use for irrigation and other farming purposes, the one-half of the waters of Thomas Creek, the natural channel of which is situate in and through' land conveyed by the same deed * * * ; that the defendant, by said deed, covenanted with the plaintiff to warrant and defend such prior right to use for irrigation and other farming purposes the water named in the deed; that by the lawful claim of one Libby and one Lamburth and by virtue of a decree of this court the plaintiff was deprived of three-fifths or less of the said water; that the defendant was by the plaintiff notified of the litigation in which such decree purports to have been entered before the commencement thereof in court; that in and about such litigation the plaintiff was necessarily put to expense for attorney's fees for the defense of such title; then the defendant was bound by the result of such decree and such covenant was broken * * * ; and the jury will proceed to ascertain from the testimony what, if any, part of such water the plaintiff was so practically deprived of; what, if anything, was the value of such part of such water; what, if anything, was a reasonable attorney fee; and you will find a verdict for plaintiff and designate in your verdict the amount, if any, in the aggregate of damages in such manner sustained by the plaintiff." Defendant excepted to the giving of this charge.

The instruction is clearly erroneous. It fails to state the true measure of damages to which plaintiff is entitled in the event of a recovery. By it the jury were to consider "what, if anything, was the value of such water." It is silent as to the time when this value is to be assessed; but it is evident from the testimony that it was the value at the time of trial that was to be considered by the jury.

The authorities in the different states upon this question are not uniform; some holding that the damages should be measured by the value of the land at the time of the eviction; others, following the rule of the common law, that the value of the land at the time of sale as ascertained by the

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purchase-money, together with interest and costs of eviction, constitutes the true rule by which the damages should be ascertained.

As this question has never been decided in this State we have examined the authorities *pro* and *con* with great care. By adopting the rule that the measure of damages should be limited to the consideration money and interest there is an absolute certainty by which the decisions of courts and juries can readily be determined. The parties ought not to complain of any hardship or injustice. The vendor sells for a certain sum and warrants the title to the property, and if there is an eviction he knows exactly what he will have to pay, and the vendee knows what he will receive. The vendee has the opportunity of examining the title before purchasing. If not satisfied with the title and the usual covenant of warranty, he has the right to insist on having other covenants inserted or he need not complete the purchase. By adopting the other rule it would be impossible for the vendor to know to what extent he would be called upon for damages in the event of eviction, and the vendee would have no security as to the amount he should receive. "When land is sold," says Walker, J., in *Threlkeld's Adm'r v. Fitzhugh's Ex'r*, 2 Leigh, 461, "the existing state of things, the present value and situation of the land, are the subjects in the minds of the parties: it is this land as it now is, that is bought and sold and warranted. Is it not most natural then to suppose that the parties mean that the purchase-money, the standard of value to which they have both agreed in the sale, shall be the measure of compensation if the land be lost? They seldom look into futurity to speculate upon the chances of a rise or fall in value. If they did, the views of buyer and seller would probably be very different and, whatever they might be, could form no part of the contract nor enter into its construction. What is it that the seller warrants? The land itself. Does this warranty either by force of its terms or by the intention of the parties extend to any future value which the lands may reach?" We think not.

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Where there has been no fraud or concealment, we are satisfied that the value of the property at the time of sale, to be ascertained by the purchase-money, with interest thereon and the costs expended in defense of the title, is the measure of damages to be recovered; and where the eviction is partial (as in the case at bar) the law will apportion the damages to the measure of value between the property lost and the property preserved. The measure of damages in such cases is the value of the part to which the title had failed taken in proportion to the price of the whole property purchased, (the whole computation being on the basis of the consideration money.)

The views we have expressed are supported by numerous authorities. Rawle on Covenants for Title, 90, 91, 318; *Staats v. Ten Eyck*, 3 Caines, 112; *Wilson v. Wilson*, 25 N. H. 229; *Kelly v. The Dutch Church of Schenectady*, 2 Hill, 116; *Pitcher v. Livingstone*, 4 Johns. 6; *Caulkins et al. v. Harris*, 9 Johns. 324; *Bender v. Fromberger*, 4 Dall. 442; *McNair v. Compton*, 35 Penn. State, 25; *Cox v. Henry*, 32 Penn. 18; *Nutting v. Herbert*, 35 N. H. 127; *Foster v. Thompson*, 41 N. H. 379; *Cox's Heirs v. Strode*, 2 Bibb, 273; *Jackson v. Turner*, 5 Leigh, 119; *Haffert's Heirs v. Buchetts*, 11 Leigh, 89; *Elliott v. Thompson*, 4 Humph. 101; *Bennett v. Jenkins*, 13 Johns. 50; *Kinney v. Watts*, 14 Wend. 40; *Peters v. McKeon*, 4 Denio, 549; *King v. Kerr*, 5 Ohio, 155; *Hunt v. Orwig*, 17 B. Monroe, 73; *Beaupland v. McKeen*, 28 Penn. State, 129; *Phillips v. Reichert*, 17 Ind. 120; *Wiley v. Howard*, 15 Ind. 169; *Major v. Dunnivant*, 25 Ills. 262; *Morris v. Phelps*, 5 John. 56. See also, Sedgwick on Damages, 182; 4 Kent. Com. 477, 580, 581.

In this case it appears that the land, water right and some personal property not mentioned in the deed were purchased for a gross sum without placing a specific value on each or any particular part. If, therefore, plaintiff is entitled to recover anything, it must be the value of the property lost in proportion to its relative value and importance when taken in connection with the whole.

The instruction is also objectionable in so far as the same

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relates to the effect to be given to the notice, which was served upon defendant on the 14th day of April, 1871. It will be observed that upon the trial of the case the plaintiff was permitted against the objections of defendant to introduce in evidence the judgment roll in the suit of Dalton v. Libby and Lamburth, for the purpose of proving that plaintiff Dalton had been evicted by a superior title.

The judgment roll, under the testimony given upon the trial, was only admissible for the purpose of showing an eviction. It was not even *prima facie* evidence that such eviction was under title paramount as against this defendant, who had not been a party or privy to the proceedings. Rawle on Covenants for Title, 237; *Sisk v. Woodruff*, 15 Ills. 15; *Prewitt v. Kenton*, 3 Bibb. 282; *Devour v. Johnson*, 3 Bibb. 410; *Cox v. Strobe*, 4 Bibb. 4; *Fields v. Hunter*, 8 Mo. 128.

When this plaintiff commenced suit against Libby and Lamburth he might have relieved himself from the burden of proving in the present action the validity of the title of Libby and Lamburth to the property in litigation in that suit, by notifying this defendant of the commencement of that action and requiring him to come in and assist in the prosecution of that case. In order to have made the result of that suit conclusive upon this defendant a notice should have been given him after the commencement of that suit. The defendant was not required to stand at the portals of justice from day to day to ascertain how, when or where the proposed suit was to be commenced. He ought not to be bound by any judgment or decree obtained in a suit where he was not a party actually or constructively, without an opportunity having been afforded him to come in and conduct or assist in conducting the proceedings in the case. He is entitled to his day in court and to have the opportunity of sustaining the title he has warranted. "To have the effect," as was held in *Paul v. Whitman*, 3 Watts & Sergeant, 409, "of depriving the warrantor of the right to show title, the notice should be unequivocal, certain and explicit. A knowledge of the action and a notice to attend the trial will not do,

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unless it is attended with express notice that he will be required to defend the title. When the warrantor is properly vouched he becomes in effect the real party in interest to the ejectment. "

We refrain from expressing any opinion upon the question whether the notice must be in writing or whether it could be given by parol. The record before us does not properly present that question.

Upon the argument of this case it was claimed by counsel for appellant that a judgment against the vendee of land in an action of ejectment by him instituted against a third person in possession, with notice to the vendor to appear and prosecute the action, is no evidence of a better outstanding title. The position assumed by counsel is fully sustained by the case of *Ferrell v. Alder*, 8 Humph. 45. It was there held that "where the vendee has been sued, he may notify his vendor to appear and defend the suit, and provision is made by law for making him defendant; but there is no principle by which he can be substituted as a plaintiff in the action of ejectment." The opinion in that case is very brief and the reasons given by the learned judge fail to convince us of the correctness of the doctrine it asserts. When the vendor is properly notified of the pendency of such an action and afforded the opportunity to assist in the prosecution of the case, we are of opinion that he becomes in effect the real party in interest, the same as if the vendee was the defendant in the action. Does not the law give him the privilege to appear and prosecute the same as it does to defend? and if he fails in either case why should he not be bound by the proceedings in the one case as well as the other? We can not perceive any substantial difference. The judgment obtained against the vendee when he brings suit and properly notifies his vendor is as much evidence of an adverse title paramount to the vendor's, as it would be when the suit is brought against the vendee. See Rawle on Covenants for Title, 227, 228; and authorities there cited.

Defendant's counsel strenuously insist that the covenant of warranty contained in the deed only applies to the land,

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and in support of this position claim that the descriptive clause in the deed relating to the waters of Thomas Creek is surplusage and therefore adds nothing to the force or effect of the deed. This position we think untenable. It is undoubtedly true that running water, as long as it continues to flow in its natural channel, can not be made the subject of private ownership except as a right incident to property in land; but it is well settled that a right may be acquired to its use by appropriation, which will be regarded and protected as property. If the only interest which defendant had in and to the water of Thomas Creek was that of a riparian owner then it was entirely useless to insert the additional language in the deed, because such a right to the use of the water would have passed with the land without inserting the additional clause. But it may be that defendant had, or pretended he had, acquired an additional right by appropriation to a given quantity of water in Thomas Creek "for irrigation and other farming purposes," and that the words "the natural channel of which is situate in and through the above described land" were inserted to designate the particular Thomas Creek, the prior rights to the waters of which were referred to in the deed. The natural inference to be drawn from the language used in the deed is that some additional right was intended to be conveyed. The grantor sold a specific quantity of land, "also, the prior right to use * * * one half of the waters of Thomas Creek"; that is, to use the meaning attached to the word *also* by lexicographers, the grantor *in like manner* sells, etc., or, in other words, the grantor, *in addition to* "the land above described," conveys "the prior right to use * * * one half of the waters of Thomas Creek."

Legal decisions give to the word *also* the same meaning and fully support the views we have expressed. Beatty, C. J., in *McCurdy v. The Alpha G. & S. M. Co.*, 3 Nev. 37, said "the word *also* certainly implies something in addition to what has gone before." In *Panton v. Tafft*, 22 Ill. 375, it was held that "the word *also* is never employed to confine

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or limit what has been already said but is used to denote that something else is added to what precedes it."

There is but one other objection in the record which we deem necessary to notice. It appeared from the testimony that the stream (Thomas Creek) divided into two equal channels at a point about one-half of a mile above the land described in the deed; that such channels did not again join together, and that only one of such channels passed through the land conveyed to plaintiff by defendant. The question then arose whether the name Thomas Creek, as used in the deed, applied to the stream above the forks (one-half of the waters of which flowed down the channel "through the land" conveyed to plaintiff) or whether it applied to the stream below the forks (all the waters of which flowed down the channel through the land conveyed to plaintiff). To determine this question parol testimony was admitted and plaintiff was permitted to testify to a conversation which took place between himself and defendant prior to the purchase of the property. The defendant was allowed by the court to testify fully as to what particular stream was meant by the name Thomas Creek, but was prohibited from testifying to the conversation which plaintiff had already testified to. In this ruling we think the court erred.

It is only necessary here to state that if upon a new trial the plaintiff is permitted to testify to any conversation between himself and defendant relative to the question as to which particular stream—the one above or the one below the forks—the name Thomas Creek (as used in the deed) referred to, then the defendant should be allowed to state his recollection of what was said and to testify fully in regard to the same conversation.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

Welland v. Huber.

HENRY WELLAND *et al.*, APPELLANTS, *v.* MELCHIOR
HUBER, RESPONDENT.

ACTION AGAINST MINING PARTNER FOR SPECIFIC INTEREST—MATTER IN ISSUE.

Where under a mining partnership between Welland, Gross, Koch and Huber, in which each party was to have an equal interest, Huber located 1000 feet of mining ground, 400 in his own name and 200 in the name of each of his partners; and afterwards Welland, Gross and Koch brought suit against Huber for a dissolution and a conveyance to them of their interests in the 400 feet located in the name of Huber: *Held*, that the fact that Welland, Gross and Koch had conveyed all the interests located in their names to Huber and declared that they had sold out their interest in the mine, constituted no defense, and that the admission of such conveyances, as evidence that Huber had acquired plaintiffs' interests in the 400 feet located in his name, was error.

DEFENSE TO BE CONFINED TO ISSUE RAISED BY PLEADINGS. In a suit to compel the conveyance of certain mining ground, where defendant relied upon an answer that plaintiff was not the owner or entitled to a conveyance: *Held*, that the defense must be confined to the matter set up in such answer.

ACTION FOR SPECIFIC PERFORMANCE—PREVIOUS DEMAND A MATTER OF COSTS.

Where a person has a right to a specific performance, such right depending upon the contract and not upon a breach of it, a demand of performance before suit brought is only important in reference to the costs of the action and has no bearing upon the merits or rights of the parties.

COSTS IN EQUITY—SPECIFIC PERFORMANCE CASES. Costs in equity are in the discretion of the court; and if a plaintiff unreasonably enforce an equitable right, depriving defendant of an opportunity to satisfy the claim made against him without suit, the relief may be granted without costs or plaintiff may be compelled to pay defendant's costs.

RIGHT TO SPECIFIC PERFORMANCE WITHOUT PREVIOUS DEMAND. Where a party located certain mining ground in his own name but under contract for another person: *Held*, that there was an implied promise to convey upon request and that such other person at once acquired a right to a specific performance, which might be enforced in equity without a previous request.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

This was an action by Henry Welland and Lewis Gross, making August Koch a party plaintiff, for the dissolution of a mining partnership alleged to exist between them and Melchior Huber and a conveyance to said Welland and Gross of one hundred feet of mining ground, being a portion of four hundred feet located in the name of Huber in the Huber Ledge, Chief Mining District, Lincoln County.

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In addition to the findings quoted in the opinion, the court below found, as facts, that no demand was made by plaintiffs upon defendant for the conveyance of any mining ground; that there was no proof of a refusal on the part of defendant to convey any mining ground prior to the commencement of the action; and, as a conclusion of law, "that to maintain an action for mining ground held by one party in trust for another, either as a copartner or under and by virtue of an agreement, a demand must first be made for the conveyance of the same."

Upon the facts and conclusions of law as found, the court below was of opinion that the defendant should have judgment for costs; and it was so ordered and entered. Plaintiffs moved for a new trial, which was overruled; and they then took this appeal from the judgment and order.

A. B. Hunt, for Appellants.

I. The issues raised by the pleadings are the fact of the formation and existence of the partnership as alleged in the complaint; whether plaintiffs and defendant were equally interested in the same and equal owners in all mining claims located; whether plaintiffs complied in substance with the conditions on their part to be performed; and whether the mining ground described in the complaint was located by and became the property of the copartnership. Each of the above issues was found in favor of plaintiffs.

II. Defendant's answer contained no allegation of any purchase by defendant from plaintiffs or either of them or from any one else of any portion of the mining ground sued for or of any mining ground. The answer is merely, in substance, a denial that plaintiffs or either of them are or ever were the owners of any part of the ground sued for and located in defendant's name. Under the pleadings all evidence given of any sale of any kind whatever should have been rejected and stricken out at the trial, as asked by plaintiffs, and should have been disregarded by the court as immaterial, irrelevant and incompetent, as foreign to any issue

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in the case and as in no manner showing or tending to show a sale of any portion of the ground sued for. 3 Greenl. on Ev. Sec. 355; *Hunt v. Daniels*, 6 J. J. Marshall, 404; *Piatt v. Vallier*, 9 Peters, 405; *Green v. Covillaud*, 10 Cal. 331; *U. S. Bank v. Schultz*, 3 Ohio, 62; *Wheeler v. Schad*, 7 Nev. 212; 2 Bland. 264; 1 Ala. N. S. 330; 1 Dev. & Bat. Ch. 36.

III. It was immaterial whether or not in point of fact the partnership had ceased to exist prior to the commencement of this suit. Because, if in fact such was the case, its legal existence still continued as to all antecedent transactions, and it is the right and privilege of each one of the partners to have his proportion of the partnership effects set apart to him. Story on Part. Secs. 92, 97, 325, 326; 1 Story's Eq. Sec. 674.

IV. It is incompetent for any party to introduce parol evidence to contradict or vary the express terms of a deed, and particularly so when such deed has been offered by himself and he claims that it was given for the purposes expressed upon its face. Even had the parol evidence given at the trial in reference to the sale been competent for any purpose, it was incompetent to show that the deeds from Welland and Gross conveyed more than 200 feet each, or any part of their interest in the 400 feet located in the name of defendant. And the doctrine that real estate can be conveyed by *intendment* in any such case as the one at bar is without precedent in this or any other country.

Bishop & Sabin and *J. C. Foster*, for Respondent.

No brief on file.

By the Court, BELKNAP, J.:

The complainants substantially allege: That in the month of December, 1871, they and defendant formed a copartnership for the purpose of discovering and locating mining claims; that in consideration of a prospecting outfit furnished the defendant he agreed to devote his time and services in prospecting for and locating mines in which all of the parties

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were to be equally interested; that in pursuance of this agreement defendant proceeded to the Chief Mining District and there located the Huber ledge; that said location contains 1000 feet,—400 of which are in the name of the defendant and 200 in the name of each of the complainants.

Complainant Koch sold all of his interest in the four hundred feet located in the name of the defendant before the filing of the bill. The bill prays for a dissolution of the partnership, and a conveyance to Welland and Gross of one hundred feet of the four hundred feet located in the name of Huber, and for costs.

Defendant answering denies having made any agreement of copartnership, and that any copartnership between himself and complainants ever existed; and denies that the complainants are or ever were the owners of or entitled to a conveyance of the four hundred feet or any part thereof.

The case was tried by the court. The facts found were: "That on or about the 25th day of December, A.D. 1871, plaintiffs and defendant entered into a verbal agreement to prospect for and locate mines, by which it was agreed by plaintiffs to furnish provisions, money and a horse for the use of defendant; and defendant agreed to give his services in prospecting for and making locations in Chief Mining District, Lincoln County, Nevada, in which all parties were to be equal owners;" that the complainants substantially complied with their part of the agreement; that under this agreement the Huber ledge was located by the defendant; that in February, 1872, Gross and Welland each sold two hundred feet of the Huber mine to the defendant, and "after selling and conveying two hundred feet each in the Huber mine they claimed and acknowledged to have sold out of said mine, and to have sold their interest in the same;" that no copartnership has existed between the parties since about January 1, 1872.

The district judge ordered judgment to be entered in favor of the defendant; and from the judgment and an order denying a new trial this appeal is taken. At the trial the defend-

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ant introduced in evidence deeds from the complainants Welland and Gross for two hundred feet each acquired by location and proved that they had afterwards declared they had sold their interest in the Huber mine. From this evidence the district judge finds as a conclusion of law that before the commencement of this action Welland and Gross conveyed their entire interest in the Huber mine to the defendant "either by deed of conveyance or by intendment."

The admission of this testimony for the purpose of proving that the defendant had acquired the interest of Welland and Gross in the four hundred feet was manifestly erroneous. The fact that the defendant was bound to defend upon the ground assumed by his pleading and no other, is a sufficient answer to the position taken by the district judge. *Smith v. Clarke*, 12 Vesey, 476; *Clarke v. Turton*, 11 Vesey, 240; *Gordon v. Gordon*, 2 Swanst. 400; *Blake v. Marnell*, 2 Ball & B. 35; *Beach v. Fulton Bank*, 3 Wend. 573; *Woodcock v. Bennett*, 1 Cowen, 734.

In *James v. McKernon*, 6 Johns. 543, upon the question whether a defense was properly in issue, Ch. J. Kent said: "The good sense of pleading and the language of the books both require that every material allegation of this kind should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry and may be enabled to collect testimony and frame interrogatories in order to meet the question. Without the observance of this rule the use of pleading becomes lost, and parties may be taken at the hearing by surprise."

No demand for a deed was alleged or proven. The object of a demand is to place the defendant in default, and with some exceptions an action at law for non-performance of a contract can only be maintained upon such technical default. The New York court of appeals, in *Bruce v. Tilson* (25 N. Y.) say, "The distinction between an action for a specific performance in equity and a suit at law for damages for non-performance, is this, that in the latter the right of action grows out of a breach of the contract and a breach must exist before the commencement of the action, while in

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the former, the contract itself and not a breach of it gives the action. A demand of performance before suit brought is only important in reference to the costs of the action, and has no bearing upon the merits or the rights of the parties."

Costs in equity are in the discretion of the court, and if the plaintiff unreasonably enforces an equitable right, depriving the defendant of an opportunity to satisfy the claims made upon him without suit, the relief may be granted without costs, or the plaintiff may be compelled to pay the costs of the defendant.

If Huber located the four hundred feet in his own name in pursuance of the alleged partnership, he did so under an implied promise to convey to the complainants their interest in it upon request. The complainants at once acquired a right to a specific performance, and that right could be enforced in equity without a previous request.

The judgment and order of the district court are reversed and cause remanded for a new trial.

THE STATE OF NEVADA, RESPONDENT, *v.* ANDREW
S. BROWN, APPELLANT.

LARCENY OF CATTLE STOLEN IN ONE COUNTY AND DRIVEN TO ANOTHER—VENUE.

A person charged with larceny of cattle may be indicted and tried for the offense in any county through which he drove them, as well as in the county where they were stolen or into which they were driven.

ASPORTATION OF STOLEN GOODS INTO ANOTHER COUNTY AN OFFENSE THEREIN.

A person stealing goods in one county and carrying them into other counties is considered guilty of the crime and may be indicted and convicted in any of such counties; because every act of the thief in the removal of the property and keeping it from the possession of the owner is, in contemplation of law, an offense.

INDICTMENT FOR LARCENY OF PROPERTY BROUGHT FROM ANOTHER COUNTY.

If property feloniously taken in one county be removed by the thief into another, the jurisdiction of the offense may, under section 90 of the Criminal Practice Act, be in either; but an indictment in the latter county must allege the offense to have been committed in such county or that the bringing of the property into such county was felonious; and if it do not, it will not be sufficient.

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APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The defendant, having been convicted in the court below of the crime of grand larceny and his motion for a new trial having been overruled, was sentenced to imprisonment in the State prison for the term of three years.

In its opinion overruling the motion for new trial, the court below referred to the question of jurisdiction as follows: "The second error assigned was that the court erred in denying defendant's motion for a discharge on the ground that the testimony showed that the cattle were stolen in Elko and found in Nye and consequently the court had no jurisdiction. The court in the first place had no right to discharge the prisoner. The most it could have done was to direct the jury to acquit him; and that direction they might have disregarded. But the court had jurisdiction. It had jurisdiction if the cattle were stolen in Elko and brought into White Pine. The testimony showed that they were driven through White Pine and into Nye. They were none the less brought into White Pine because they went out again. The moment they were brought into this county the jurisdiction attached, and driving them out again did not defeat it."

J. J. Maxwell, for Appellant.

Either Elko County or Nye County had jurisdiction to the exclusion of all others. At common law the place where the thing was taken or theft committed had exclusive jurisdiction. It required the culprit to be brought back with his plunder, and not that the outraged citizen should follow him with his train of witnesses to obtain redress. Our legislature extended the jurisdiction so as to include the county where the property and thief are *apprehended*, but not to counties through which they pass only. Suppose the subject of the theft be coin or a check, and the thief traverse the State with it, what reason could prompt our legislature

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in giving jurisdiction to any intermediate county through which he might pass?

Robt. M. Clarke, also for Appellant.

The indictment is fatally defective. It does not charge a crime committed within the jurisdiction of the court. It should have charged a felonious taking, etc., in White Pine County. 1 Chitty's C. L. 178, 179; 2 Russ. on Crimes, 116, 117, 118.

John R. Kittrell, District Attorney, and *F. W. Cole*, for Respondent.

The rule of the common law in reference to jurisdiction has been changed by our statute, and the meaning of the statute has been settled by the case of *People v. Robles*, 29 Cal. 421. The California supreme court in that case construe the statute, of which ours is a copy, and hold "that when property has been feloniously taken in one county and brought into another, jurisdiction of the offense shall be in either county.

By the Court, HAWLEY, J.:

Appellant was jointly indicted with one James Parker by the grand jury of White Pine County for the crime of grand larceny. The indictment alleges "That the said Andrew S. Brown, * * on or about the third day of October, * * (1872,) at the County of Elko, State of Nevada, eleven head of cattle, * * * the personal property of Norman Wines, * * then and there being found, feloniously did steal, take and drive away. And the said defendants, Andrew S. Brown, * * being so in possession of the said eleven head of cattle, as aforesaid, did, on or about the seventh day of October, * * (1872), bring each and every of said eleven head of cattle * * * into the said County of White Pine, State of Nevada, * * *."

Appellant was found guilty as charged in the indictment. There are only two errors assigned in the bill of exceptions:

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first, that the court erred in refusing defendant's motion for a continuance; second, that the court erred in refusing to dismiss the cause for want of jurisdiction. From the views we entertain of this case it is unnecessary to examine or pass upon the ruling of the court refusing a continuance.

The position contended for by counsel in support of the second assignment of error, that the court had no jurisdiction of the offense because the cattle were driven *through* White Pine County *into* Nye, is without merit or pretense of authority. The law is too well settled to require any argument or citation of authorities that defendant under the testimony could have been properly indicted and tried in either of the Counties of Elko, White Pine, or Nye.

Upon the argument in this court, counsel for appellant claims that the indictment is fatally defective in this, that it does not allege the commission of any offense within White Pine County. The Criminal Practice Act provides that "when property feloniously taken in one county by * * * larceny has been brought into another county, the jurisdiction of the offense shall be in either county." Stats. 1861, 444, Sec. 90. At common law a defendant charged with larceny could be indicted and tried in any county into which he took the property. This was upon the principle laid down in all the text-books, "that the possession of goods stolen by the thief is a larceny in every county into which he carries the goods, because the legal possession still remaining in the true owner, every moment's continuance of the trespass and felony amounts in legal consideration to a new caption and asportation." 1 Chitty's Cr. L. 179; 2 Russ. Cr. 116, 117, 118; 1 Bishop's Cr. Procedure, Secs. 75, 76; 3 Greenl. Ev. Sec. 152. The statute has not changed this rule. This question has been repeatedly decided under statutory provisions, as well as by the rule of the common law; and the courts have uniformly held that a person stealing goods in one county and carrying them into other counties is considered as guilty of the crime and may be indicted and convicted in either county; because every act of the thief in the removal of the

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property and keeping it from the possession of the owner is, in contemplation of law, an offense. *Haskins v. People*, 16 N. Y. 348; *The People v. Smith*, 4 Parker, Cr. R. 255; *State v. Douglas*, 17 Me. 195; *Commonwealth v. Cousins*, 2 Leigh, 708; *State v. Somerville*, 21 Me. 19; *State v. Underwood*, 49 Me. 185; *Morrissey v. People*, 11 Mich. 329; *State v. Seay*, 3 Stewart (Ala.) 130; *Aaroon et al. v. State*, 39 Ala. 689; *People v. Mellen*, 40 Cal. 654. This principle being so well established, it follows that the offense should have been alleged in the indictment to have been committed in the county where the indictment was found.

In *Haskins v. People*, the goods were stolen in Cayuga County and brought into Onondaga County. The indictment alleged the offense to be in Onondaga County and the defendant objected to the indictment for that reason. Denio, C. J., held the indictment to be sufficient, and in deciding the question said: "It was unnecessary, and I think it would have been erroneous, to have set out in the indictment the offense in Cayuga County. The courts in Onondaga County had no jurisdiction of that transaction, as a distinct offense. It was simply matter of evidence, to characterize what was done in Onondaga, and to show the quality of that act. * * * In the case of an indictment for a simple larceny, found in a county into which the thief has carried the property stolen in another county, *the law adjudges that the offense was in truth committed there*, and hence there is no occasion for a statement in the pleading of what occurred in the other county."

In *Morrissey v. People* it was held that the indictment "must state the crime for which the prisoner is tried, but it need not and should not state the evidence by which it is to be proved." In *People v. Mellen*, cattle were stolen by defendant in the County of Sacramento, and were afterwards driven to the County of Yuba, where they were found in the possession of defendant. The indictment alleged the offense to have been committed in Yuba County. Rhodes, C. J., in delivering the opinion of the court said: "The statute does not prescribe the form of the indictment * * but the

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offense is considered as committed in each county into which the thief carries the property * *. It is accordingly held, that it is proper to charge the thief with the commission of the offense in the county into which he took the property. Some of the cases hold that it is not improper to charge him, also, in the same indictment, with the commission of the larceny in the county where the property was first stolen; but none of the cases brought to our notice hold that it is necessary."

In the case at bar the indictment should have been drawn locating the venue in White Pine County. For aught that appears in the indictment, the asportation in Elko County may have been such as to render the defendant liable to a conviction for larceny there and still the possession in White Pine be lawful, or the owner of the stolen property before it was brought within the limits of White Pine County may have made a transfer of his right to the prisoner or consented that he should take it into White Pine. If proper to have set forth the offense in Elko County the indictment would still be fatally defective in not stating that the act of defendant in bringing the cattle into White Pine County was felonious.

The indictment fails to charge that any offense was committed within the county where it was found. The judgment must be reversed; and as the indictment is radically defective, the court below will submit this case to another grand jury.

It is so ordered.

THE STATE OF NEVADA, RESPONDENT, *v.* AH TOM
et als., APPELLANTS.

CRIMINAL LAW—DECLARATION OF CO-DEFENDANT AFTER OFFENSE NOT EVIDENCE AGAINST OTHERS. On a trial of Ah Tom and others for grand larceny, where the State was permitted, under objection, to prove the declarations of Ah Tom, made several days after the larceny and not in the presence of his co-defendants, to the effect that he was innocent but he knew them to be guilty: *Held*, clearly error as against such co-defendants.

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DECLARATIONS OF DEFENDANT EXCULPATING HIMSELF AND INCULPATING CO-DEFENDANTS. A mere gratuitous assertion by one of several defendants charged with crime, exculpating himself and inculpating his co-defendants, should never be received as evidence against any one but himself.

REVERSAL OF CONVICTION FOR WANT OF COMPETENT EVIDENCE. If there is no competent evidence to sustain a verdict of conviction, the judgment, on the point being properly presented, will be reversed.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The defendants, Ah Tom, Ah Ping, Ah Mok and Ah Loy, were indicted at the January term, 1872, of the court below of the crime of grand larceny, for stealing at Reno, Washoe County, on October 26, 1871, \$517 50 in coin, a watch, chain, pistol, and other articles, together with a trunk, the property of one Ah Fung. It appears that on the day before the loss of his property, Ah Fung arrived at Reno with his trunk and meeting Ah Tom, with whom he had been acquainted for several years, stated that he intended in a day or two to go to San Francisco, and requested to be allowed to leave his trunk in Ah Tom's cabin, at the same time desiring to know if it would be safe; that Ah Tom replied it would, as no one else lived there but his relations Ah Mok and Ah Ping; that he and Ah Tom then carried the trunk to the cabin, where Ah Fung opened it and showed Ah Tom that it contained the money and other articles mentioned in the indictment; that the next day Ah Fung went again to the cabin and found Ah Mok, Ah Ping and Ah Loy there; that he opened his trunk in their presence and took out \$20, to pay his fare to San Francisco, and they saw his money and other property in the trunk; that a little more than an hour afterwards he met Ah Tom and the two went in company to get the trunk, but it was gone; that at Ah Tom's suggestion officers were employed and a reward of \$100 offered by Ah Fung for the recovery of the property, but it could not be found.

The prosecuting witness, after stating the above facts, testified that a few weeks afterwards Ah Tom went to San Francisco; that he followed him and demanded he should

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pay the money; that Ah Tom refused to do so; that he then complained to the head Chinese merchants at San Francisco about the matter, and they had a meeting, at which he and Ah Tom were present. The witness then offered to repeat a statement made by Ah Tom at that meeting as to the property having been taken by the defendants, Ah Ping, Ah Mok and Ah Loy. Defendants objected on the grounds that such declarations were not made in the presence of the other defendants; that no complicity was shown between defendants, and that such declarations were not competent testimony against them. The court overruled the objections and defendants excepted. Witness then testified that Ah Tom first said he knew nothing about the taking of the property; afterwards he said he had nothing to do with it, but Ah Mok, Ah Ping and Ah Loy took it; that he would go back to Reno and get them to pay \$400 to settle the matter, and that he would do so because it was taken from his house.

Counsel for defendants then moved to strike out the testimony of Ah Tom's declarations at San Francisco in so far as it affected Ah Mok, Ah Ping and Ah Loy, which motion was refused, and they excepted. The witness proceeded to testify that he returned to Reno, saw Ah Ping and Ah Loy, told them what Ah Tom had said; that they told him all the money was gambled off, but they would give him \$100 to settle the matter, and that each one said he had not stolen the money, but it was somebody else. Some two months afterwards different articles of the stolen property were found, some in Ah Ping's room, some in Ah Loy's.

Another witness, Ah Toc, testified that "on the 26th of October, 1871, at 5 o'clock and 15 minutes," he saw Ah Ping, Ah Mok and Ah Loy near Ah Tom's cabin. Ah Ping and Ah Loy were carrying a trunk, and Ah Mok was shutting the door.

There was considerable other testimony, that for defendants almost directly contradicting that on the part of the State; but there was substantially nothing more to implicate Ah Tom than is indicated above.

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The defendants having been convicted, and their motion for a new trial overruled, were sentenced to imprisonment in the State prison, Ah Tom, Ah Ping and Ah Loy for five years and Ah Mok for one year. They all appealed from the judgment and order.

Robert M. Clarke, for Appellants.

The defendants were jointly indicted and jointly tried for the crime of grand larceny. There was no evidence legal or otherwise connecting Ah Tom with the offense. As to the other defendants there was no evidence, except the statement of Ah Tom and the constructive possession of part of the goods, criminating them. But the statement of Ah Tom inculpatng the other defendants and exculpating himself was clearly incompetent. And the constructive possession of part only of the property by some only of the defendants was clearly insufficient to justify conviction.

There was error in admitting the statements of Ah Tom as evidence against Ah Mok, Ah Ping and Ah Loy; also in admitting evidence showing that two months after the larceny, a portion of the stolen property was found in a house occupied in part by some of the defendants. Even recent actual and exclusive possession of stolen property is not alone sufficient to support a conviction for larceny. 20 Cal. 177; 23 Cal. 51; Wharton, Sec. 728. Nor was evidence showing the property found in a house, occupied by some of the accused in common with others not accused, either sufficient or competent. Wharton, Sec. 728; Roscoe Ev. 18; 3 Greenleaf Ev. Sec. 33. There was therefore no legal evidence to support the verdict.

L. A. Buckner, Attorney General, for Respondent.

By the Court, HAWLEY, J.:

This appeal is taken from an order of the district court refusing a new trial and from the judgment. The defendants were jointly indicted and tried for the crime of grand larceny.

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During the trial of the cause the State was allowed to introduce in evidence certain declarations made by the defendant, Ah Tom, to Chinese merchants in San Francisco several days after the larceny was committed, to the effect that he was entirely innocent of the offense but knew that his co-defendants were guilty. Neither of the other defendants were present when this statement was made. The admission of this testimony against the objections of defendants, Ah Mok, Ah Ping and Ah Loy, was clearly erroneous.

If there had been complicity between all of the defendants in the commission of the offense, the declarations made by either after the commission of the offense could not be used as evidence against the other defendants. A mere gratuitous assertion made by a defendant charged with crime, exculpating himself and inculpating his co-defendants, should never be received as evidence against any one but himself. 1 Phill. Ev. 97; 1 Greenleaf Ev. Sec. 111; *Commonwealth v. Hunter*, 7 Gratt. 644; *U. S. v. White*, 5 Cranch C. C. R. 42; *State v. Hanney*, 2 Dev. and Bat. 390.

The admission of this testimony was calculated to mislead the jury to the prejudice of the defendants, Ah Mok, Ah Ping and Ah Loy, and was such an error of law as necessitates a reversal of this case as to them.

Is the testimony contained in the bill of exceptions sufficient in law to sustain a conviction against the defendant Ah Tom? Entertaining the opinion that appellate courts should never disturb the verdict of a jury upon this ground when there is any legal evidence tending to prove defendant's guilt, we have carefully examined the record in this case and have arrived at the conclusion that there is no competent evidence to sustain the finding of the jury against the defendant Ah Tom.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

Warren v. Quill.

W. P. WARREN *et al.*, APPELLANTS, *v.* JOHN QUILL *et al.*; RESPONDENTS.

ACTION NOT MAINTAINABLE BY MARRIED WOMAN PLAINTIFF WITHOUT PROPER AVERMENTS. In a suit by W. P. and Olive Warren for diversion of water, where it appeared on the trial that Olive was the wife of one Haven and the complaint was amended by substituting her true name but without adding any averments of her right to sue alone: *Held*, that the admission of evidence on such an amended complaint against defendants' objection was error.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action by W. P. Warren and Olive Warren against John Quill and Timothy Conley for damages for diversion of a stream of water from premises alleged to belong to plaintiffs in Ormsby County, and for an injunction to restrain future diversion. On the trial it appeared that the premises had been originally conveyed to W. P. and Olive Warren, but that since that time and before the commencement of this suit Olive had intermarried with Isaac Haven; upon the coming out of which fact plaintiffs' counsel asked and obtained leave to amend the complaint by making Olive Haven a party plaintiff instead of Olive Warren. Defendants excepted. Defendants then objected to the admission of any testimony under the amended complaint, for the reason that the action could not be sustained under the averments of the complaint as so amended. Their objection was overruled. They afterwards moved for a non-suit on the ground that the proofs did not support or conform to the allegations of the complaint, which motion was denied; and judgment was rendered and entered for plaintiffs, perpetually enjoining defendants from any further diversion of the stream described in the complaint.

Defendants next moved for a new trial upon the grounds mainly that there was error in admitting any evidence on the trial after it was shown that Olive was at the commencement of the action a married woman, cohabiting with her husband; and that there was error in allowing the action to proceed in the name of Olive Haven—the proof showing her to be a

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married woman cohabiting with her husband and it not being alleged or proved that the suit concerned her separate property or was between herself and husband. The motion for a new trial having been granted, plaintiffs took this appeal from the order.

Robert M. Clarke, for Appellants.

Wm. Patterson, T. D. Edwards, and Ellis & King, for Respondents.

By the Court, WHITMAN, C. J.:

A decree of injunction against respondents was set aside and a new trial granted; whence this appeal. No special reason for the order is given; but warrant therefor is found in error of law occurring at the trial and excepted to by respondents. The complaint was by W. P. and Olive Warren. On the examination of the former, it appeared that his co-plaintiff was at the time of suit brought and then a married woman, by name Olive Haven. On appellants' motion, the complaint was amended by the substitution of the latter name and thus the trial proceeded, against the objection of respondents to the admission of evidence under the amended complaint, in which was no averment of Olive Haven's right to sue alone. To the overruling of their objection respondents excepted. This was well taken.

The order granting a new trial is affirmed.

WILLIAM SKYRME, RESPONDENT, v. THE OCCIDENTAL MILL AND MINING COMPANY *et als.*, APPELLANTS.

COMPLAINT ON MECHANICS' LIENS—OMISSION OF ALLEGATION OF TIME OF FILING.

Where a complaint to foreclose mechanics' liens failed to show that they were filed within six months before the commencement of the action: *Held*, that the omission was one which should be taken advantage of by demurrer, and that after issue joined and decision rendered on the merits the pleading would be upheld by every legal intendment.

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SUFFICIENCY OF COMPLAINT TO FORECLOSE MECHANICS' LIENS. The sufficiency of a complaint for foreclosure of mechanics' liens is to be determined by the statute; and if there is a substantial compliance with the requirements of the statute it is sufficient.

MECHANICS' LIENS ASSIGNABLE. Mechanics' liens are assignable and may be enforced by an action in the name of the assignee.

ASSIGNMENT OF MECHANICS' LIENS FOR PURPOSE OF SUIT. Where various holders of mechanics' liens assigned to one upon an understanding that he was to bring suit in his own name, each assignor to bear his proportion of the expense incurred and to share *pro rata* in the amount realized: *Held*, that a suit by such assignee on all the liens might be maintained.

WORDS USED IN ASSIGNMENT OF MECHANIC'S LIEN. Where an assignment was indorsed on a mechanic's lien as follows: "For value and in consideration of the sum of one dollar in hand paid by Wm. Skyrme, the receipt whereof is hereby acknowledged, I do sell, assign, transfer and set over to said Wm. Skyrme the within lien and all my rights thereunder." *Held*, that the language used was broad enough to include the debt secured by the lien.

MECHANIC'S LIEN, WHAT. The paper called a mechanic's lien is simply evidence that the acts required by statute have been performed and that therefore the lien created by the statute has attached; and an assignment of such paper with all rights thereunder is an assignment of the debt as well as of the lien.

NO PARTICULAR WORDS NECESSARY TO ASSIGNMENT. No particular words are necessary to constitute an assignment of a debt; it is sufficient if the intent of the parties to effect an assignment be clearly established.

ASSIGNMENT AFTER SUIT BROUGHT BY ASSIGNEE. Where mechanics' liens had been assigned and suit brought on them in the name of the assignee, and afterwards new and more formal assignments were made: *Held*, that the latter were irrelevant as evidence in the case, but that their admission was immaterial error, not affecting the decree.

EFFECT OF NEW LAW ON OLD MECHANICS' LIENS. Where suit was brought to foreclose mechanics' liens which attached under the act of 1861 (Stats. 1861, 35) after the repeal of that law by the act of 1871 (Stats. 1871, 123); and it was claimed that the lien, being nothing but a remedy, fell with the repeal of the law: *Held*, that neither the lien was lost nor the right to enforce it.

CONSTRUCTION OF MECHANICS' LIEN LAWS. The new mechanics' lien law of 1871 (Stats. 1871, 123), which took effect simultaneously with the repeal of all former acts on the subject, was intended as a substitute therefor; but instead of entirely abrogating and annulling such prior laws it had the effect of continuing them in force so far as existing rights thereunder were concerned.

NO JOINT MECHANICS' LIENS WITHOUT JOINT INTEREST. There is no provision in the mechanics' lien law for filing joint liens when no community of interest exists; and, if an attempt has been made to file a joint lien, it does not prevent the several lien claimants from filing individual liens.

MECHANIC'S LIEN FOR WORK DONE BY MINER UNDER VARIOUS CONTRACTS. Where miners filed mechanics' liens for work done in the development of a mine, and it appeared that they worked a portion of the time under special contracts and a portion of the time by the day, but always under the direction of the foreman of the mine: *Held*, that the work was to be considered as one continuous

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employment and not as distinct and independent jobs or contracts, and that each miner might file one lien for all his labor within the proper time after stopping work.

REQUISITES OF NOTICE OF MECHANIC'S LIEN. Where the notice of a mechanic's lien recited that it was to secure the performance of a contract to pay the money specified in a certain note, given in settlement according to agreement for labor performed as a miner in extracting ore and working in a certain mine for a certain time: *Held*, that though it would have been better to state clearly the character of work and by whom and for whom done, yet it was not so defective as to prevent the enforcement of the lien.

EFFECT OF TAKING AND ASSIGNING NOTE UPON MECHANIC'S LIEN. Where a person, who had done work as a miner in a mine, upon settlement and adjustment of accounts with the owner took his note as evidence of the amount due, and afterwards having filed a mechanic's lien for the amount assigned his note and lien to another person, who brought suit: *Held*, that no rights of the miner or his assignee were relinquished or lost by the acceptance or transfer of the note.

MECHANICS' LIEN LAW TO BE LIBERALLY CONSTRUED. The mechanics' lien law is to be liberally construed so as to give lien claimants the benefits intended by the legislature.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action to foreclose mechanics' liens to the amount of \$10,167 in coin against the Occidental Mill and Mining Company, a corporation doing business at Virginia City. William Sharon, E. H. Dyer, and Mark Strouse were made defendants as having or claiming interests which were alleged to be subsequent to those of plaintiff.

The complaint set out the rights of plaintiff, as the holder of a mechanic's lien for work performed by himself and as assignee of various liens of the same general character for work performed by his assignors, at the company's mine in Storey County between May 1, 1870, and October 23, 1870. There was no demurrer, but a very full answer. The testimony was taken before a referee; and upon the coming in of his report the various points were argued before the court. The result of the trial was a decree in favor of plaintiff for \$8243 78 and costs in coin, and for a sale of the company's mine and claim to satisfy it.

Defendants moved for a new trial, which was denied, and they then appealed from the order.

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"Exhibits from 40 to 46 inclusive," referred to in the opinion, consisted of fermal assignments, made out after the commencement of the suit, in reference to seven of the liens sued on. Other facts are fully stated in the opinion.

R. S. Mesick, for Appellants.

I. The want of any averment of the date when the liens were filed or of the fact that they were filed within six months prior to the filing of the complaint renders the complaint destitute of any statement of facts showing the existence of a lien.

II. The liens were not assignable so as to be capable of enforcement in the name of the plaintiff as assignee. *Caldwell v. Lawrence*, 10 Wis. 331; *Pearson v. Tinker*, 36 Maine, 384; *Bicknell v. McKey*, 34 Maine, 273. Such a lien, like a vendor's lien, is a mere personal privilege and not assignable. *Brown v. Grisby*, 21 Cal. 172; *Lewis v. Covillaud*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227.

III. The mere assignment of the lien could not pass the original claim or demand. 30 Cal. 688. In any legal view of the case the construction of language written upon a paper denominated a lien, purporting to assign "the within lien and all rights thereunder," must be the same as if written upon a mortgage purporting to assign the within mortgage and all the rights thereunder. The one would be an assignment of simply the mortgage lien or interest of the assignor in the mortgaged property; and upon like principles, the other would be only an assignment of the mechanic's or laborer's lien or interest of the assignor in the property subject to the lien; and both must be equally void.

IV. The lien laws, by which the liens claimed in this suit including that of the plaintiff existed, were repealed by the law of March 4, 1871; and the liens fell with the law. Such liens are nothing but a remedy created by the legislature and liable by legislative enactment to be changed or abolished at any time before suit, or during the pendency of suit for the enforcement of the remedy. *Bangor v. Goding*, 35

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Maine, 73; 54 Maine, 345; 41 Mo. 204; *Stocking v. Hunt*, 3 Denio, 274; *Brennan v. Swasey*, 16 Cal. 140; 21 Pick. 169; 2 Wallace, 463. It seems to us that the law of 1871 is not a mere substitute for the previous lien laws; and if it is not, those prior liens are gone. The remedy is purely statutory and is extraordinary. By its being taken away the right is not destroyed or seriously affected. There still remains to the claimant all the ordinary remedies of the law against the debtor.

V. No suit was brought until more than six months after the liens were originally filed, and when by the provisions of the statute they had ceased to bind the property. A party could file but one lien upon the same claim for labor or materials. The lien law once availed of became *functus officio* as to the same demand. Hence the liens afterwards filed and on which this suit was based were of no effect. The joint liens were a sufficient compliance with the statute. There is no reason outside or inside of the statute why liens should not be filed together, any more than why they could not be enforced when set up together by the holders in one answer in a suit brought under the lien law and notice published. The court should advance the remedy to every reasonable extent, there being in the law no prohibition of such a course.

VI. Exhibits from 40 to 46 inclusive can make no difference with the plaintiff's case as it stood at the time the complaint was filed. Being subsequent thereto they were irrelevant and incompetent for any purpose.

VII. For distinct jobs of work or separate periods of employment appearing to have no connection, the lien must have been filed within sixty days of the time of the completion of each; and for work done in such jobs and periods completed more than sixty days prior to such filing the lien was lost; and the filed claims and accounts as well as the complaint must show facts sufficient to make the work continuous; otherwise no lien could attach for work done prior to the sixty days. *Livermore v. Wright*, 33 Mo. 31; *Wade v. Reitz*, 18 Ind. 307; *Spencer v. Barrett*, 35 N. Y. 94; *Fowler v. Bailey*,

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14 Wis. 130; *Wilson v. Forder*, 30 Pa. 129; 8 Allen, 573, 593; 11 Allen, 154; 13 Gray, 311; 6 Gray, 531.

VIII. The exhibit in reference to the Tonkin lien does not on its face entitle the party filing it to any lien. The lien is not claimed for work or labor performed. There is no direct statement that there was any work or labor done, or if done, for whom; nor that the party claiming the lien performed any work or labor whatever. Again, the promissory note mentioned was received by Tonkin in full payment, according to the evidence; but if received only as a conditional extinguishment of the debt for work, it became upon its sale and transfer to plaintiff an absolute extinguishment of the debt and waiver of the lien. *Scott v. Ward*, 4 Green (Iowa) 112; Story on Prom. Notes, § 405; 35 Maine, 126; 40 Mo. 257. In the hands of the assignee it became our absolute and unconditional payment and extinguishment of the original debt to Tonkin; and this extinguishment and payment is totally inconsistent with continuation of the lien, which depended entirely upon the continued existence of the original debt.

W. E. F. Deal and *J. A. Stephens*, for Respondent.

I. The complaint fully complies with the requirements of the statute. Stats. 1861, 37, Sec. 7; Stats. 1871, 123, Sec. 9; *Brennan v. Swasey*, 16 Cal. 142. The statute contemplates a special proceeding although a suit is commenced by the filing of a complaint and issuance of summons. No judgment can be taken by default, but on the day named in the notice the plaintiff and all other claimants are required to appear and make full proof of their liens. *McNeil v. Borland*, 23 Cal. 149.

II. Plaintiff should have had an opportunity to amend his complaint if it was deficient in the particulars claimed. The court will support the complaint by every legal intendment if there be nothing material in the record to prevent it. *Meadow Valley M. Co. v. Dodds*, 6 Nev. 264; *McManus v. Ophir Co.*, 4 Nev. 18; *Regan v. O'Reilly*, 32 Cal. 11; *Peter v*

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Foss, 20 Cal. 586; *James v. Goodenough*, 7 Nev. 327; *Hawthorne v. Smith*, 3 Nev. 193; *Howard v. Richards*, 2 Nev. 133. The evidence shows that the suit was commenced in time, and there is no specification in the statement showing that the complaint was objected to on the ground that it stated no cause of action. In such case the court will not notice the objection made here for the first time. See *Clarke v. Lyon County*, ante, 181.

III. The legislature upon adopting the statute from California must be presumed to have adopted the construction given it by the supreme court of California. *Ash v. Parkinson*, 5 Nev. 24. That court prior to the passage of our law decided that a mechanic's lien was in the nature of a mortgage and could be assigned by a sale and transfer of the debt in writing. *Brock v. Bruce*, 5 Cal. 280; *Ritter v. Stevenson*, 7 Cal. 389; *Tuttle v. Howe*, 14 Minn. 145; *Taege v. Bosseaus*, 19 Grattan, 99; *Hurt v. Wilson*, 38 Cal. 264; *Hoyt v. Thompson*, 1 Selden, 347.

IV. The case cited from 10 Wis. 331 by appellant decides that under the statute of Wisconsin mechanics' liens are not assignable. But an examination of the authorities cited in support of the decision by the learned judge, who wrote the opinion, does not warrant his conclusions. He has taken an expression, used by the judge in an English case cited in reference to a totally different matter, in support of the proposition that a personal right can not be transferred. See also *Daubigny v. Duval*, 5 Durnford & East, 603; 7 East, 5; 4 John. 102.

V. The liens were all assigned by the written assignment indorsed on the back of each of the notices. These notices contained the accounts due; and the language used shows that it was the intention of the assignors to transfer not only the lien but the debt secured by it. The court should give the instrument a construction that will carry out that intention. *Murdock v. Brooks*, 38 Cal. 605.

VI. The repeal of the statutes of 1861 and 1867 by the statute of 1871 does not deprive plaintiff of his remedy. Acts modifying previous remedies should be so construed as

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not to affect rights of action, which have attached and become vested under the original law and existing at the time of the repealing statute. Sedg. on Stat. and Const. Law, 134; *Bedford v. Shelling*, 4 Serg. and Rawle, 401; *Duffered v. Smith*, 3 Serg. and Rawle, 590; *Hitchcock v. Way*, 4 Ad. and El. 943; 3 Ad. and El. 884; 4 Denio, 374; 2 Comstock, 182; 7 John. 503; 4 Barb. 75. The act of 1871 is a substitute for all the previous acts and was not intended to abrogate or annul them. *Steamship Co. v. Jolliffe*, 2 Wallace, 450; 1 Oregon, 119. The same construction has been given the statute of 1871 by the U. S. District Court of Nevada in *Sabin v. Connor*.

VII. The joint liens first filed by plaintiff's assignors were null and void for want of a substantial compliance with the statute. There is nothing in the statutes to warrant the filing of a joint lien unless there is a joint interest. They require the filing of a separate account and description by every person claiming the benefits of the act. Each of plaintiff's assignors made a separate contract with defendant; each contract was made at a different time from the others.

VIII. The work done by plaintiff's assignors was continuous, and they by filing their accounts and descriptions acquired a lien on defendant's mine for the whole work. 62 Pa. St. 9. A review of the testimony will show that the work was continuous; that the assignors, who did contract work, did not stop working; that is, that there was no new contract or employment.

IX. The taking of a promissory note for the amount due Tonkin did not deprive him of the benefits of the lien law. 4 Greene (Iowa), 112; 40 Mo. 261; 24 Ill. 110; 6 Bush (Ky.) 508; 17 Cal. 129. Nor did the transfer of the note to plaintiff extinguish the lien. The very purpose of the assignment was that the lien should be preserved. The note was delivered up at the trial to be cancelled. 40 Mo. 261; 2 Story, 470.

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By the Court, HAWLEY, J.:

This is an action to foreclose thirty nine mechanics' liens, thirty-eight of which were assigned to plaintiff to enable him to commence this suit. The liens were claimed by plaintiff and his assignors, as miners, under the act of 1867. (Stats. 1867, 48, Sec. 1.) The appeal is from an order of the court refusing appellants a new trial.

The complaint regularly sets forth the fact, in separate counts, that each assignor performed certain work and labor on the mine owned by the Occidental Mill and Mining Company, a corporation, defendant in this suit, between the first day of May, 1870, and the twenty-third day of October, 1870; that within sixty days after the completion of the work each assignor filed in the office of the county clerk of Storey County his account and demand properly verified, together with a correct description of the property to be charged with his lien; also his notice of intention to claim a lien upon the property therein described as required by Sec. 2 of the act of 1861, (Stats. 1861, 35) and closed with an averment that each assignor, "by reason of the work and labor so done as aforesaid and by complying with the provisions of the said acts of the legislature of the State of Nevada, acquired a valid lien upon the said * * mining claim * * which lien remains wholly unsatisfied."

There is no averment in the complaint as to the time when the liens were filed, nor does it appear therefrom that the liens which were assigned to plaintiff were filed within six months prior to the filing of the complaint. For this omission appellants claim that the complaint is entirely destitute of any facts showing the existence of a lien at the time of the commencement of this action. Appellants did not interpose any demurrer to plaintiff's complaint; but appeared and filed an answer, denying (with other denials) that either of the assignors "ever filed or there was recorded in the office of the county clerk of Storey County any just or true account of the demand due him from the said company

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defendant, for the work and labor mentioned in said complaint, or ever complied with the provisions of the acts of the legislature or any of them mentioned in said complaint, or ever acquired any lien upon the property or premises or any part thereof mentioned in said complaint, or ever sold, assigned, transferred or set over to the plaintiff any lien upon the said property * * * or that the plaintiff ever was the owner or holder of any lien thereon" derived from the assignors or either of them.

If we were to apply the strict rules of pleading to this complaint as in other civil actions, it might be defective in not stating the date when the liens were filed so as to show upon its face that the suit was commenced within six months thereafter. But we are of opinion that this omission is one which should have been taken advantage of by demurrer. After issue has been joined and a decision rendered upon the merits, it is the duty of appellate courts to support the pleading by every legal intendment if there be nothing material in the record to prevent it. Stats. 1869, 206, Sec. 71; *McManus v. Ophir Silver M. Co.*, 4 Nev. 18; *Meadow Valley Mining Co. v. Dodds*, 6 Nev. 264; 1 Van Santvoord's Plead. 834.

We are also of the opinion that the sufficiency of this complaint is to be determined by the statute. The statute creating the right whereby liens are acquired also provides the manner in which they may be enforced. Section 7 of the act of 1861 provides that "said liens may be enforced by suit in any court of competent jurisdiction on setting forth in the complaint the particulars of such demand, with a description of the premises sought to be charged with said lien." Stats. 1861, 37. The same language is contained in Sec. 9 of the act of March 4, 1871. Stats. 1871, 126. While the statute provides for a formal suit, it evidently contemplates a special proceeding in regard to the enforcement of mechanics' liens. It requires the plaintiff at the time of commencing his action to cause a notice to be published notifying lien-holders to appear in court on a certain day and exhibit proof of their liens, at

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which time the court is required to proceed in a summary way to determine said liens and all liens not then presented are deemed to be waived in favor of those that are exhibited. No default can be taken so as to avoid the necessity of proving the liens. Considering the averments in the complaint with special reference to the act of the legislature, we are of opinion that there is a substantial compliance with the requirements of the statute.

Appellants claim that the liens are not assignable. The decisions upon this question differ with the construction of statutes and the different views entertained by judges in the several states. The position contended for by appellants is fully sustained in *Caldwell v. Lawrence*, 10 Wis. 331, and *Pearson v. Tinker*, 36 Maine, 387. The conclusion arrived at in both of these cases was that a mechanic's lien being the creature of the statute simply conferred a personal right which could not be transferred, and hence that such liens could only "be enforced in the name of the party to whom it accrued."

In *Tuttle v. Howe*, 14 Minn. 150, it was held that the lien of a mechanic or material man might be assigned and that the assignee, in his own name, might maintain an action to enforce the same. Berry, J., in delivering the opinion of the court, said: "The lien law is designed for the protection of the material man, the mechanic and other persons performing labor upon buildings. As an assignment is not prohibited, and there is nothing in the nature of a lien which would render its transfer improper or injurious, and as the lien is wholly a creature of statute, the statute should be so construed (if it fairly may be) as to make the protection which it designs to afford as valuable and effectual as possible. And upon these grounds we think the assignability of mechanics' liens ought to be sustained if fair construction will permit it."

We do not think the authorities cited in support of *Caldwell v. Lawrence* sustain the decision in that case. It is true, that in *Daubigny v. Duval*, (5 Term R., 603) the court said: "A lien is a personal right and cannot be transferred

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to another." But the court was considering an entirely different character of liens than those provided for in our statute to secure mechanics and other laborers. The only principle decided in *Daubigny v. Duval* is that a factor has no right to pledge the goods of his principal. But this rule is subject to exceptions as shown by *Urquhart v. McIver*, 4 Johns. 102; *McCombie v. Davies*, 7 East. 5, cited in *Caldwell v. Lawrence*.

In *McCombie v. Davies*, Lord Ellenborough, C. J., said "that nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods * * *. His lordship then, after consulting with the other judges, declared that the rest of the court coincided with him in opinion that no lien was transferred by the pledge of the broker in this case, and added that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*; and not to the case of one who intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien."

The statute of Maine in regard to enforcing mechanics' liens is radically different from the statute of this State. In the Wisconsin statute there is a provision that the lien claimant may proceed to recover his lien by a "personal action against the debtor." The statute of Minnesota also differs from the statute of this State in several particulars. The law in regard to mechanics' liens is a constant subject of legislative action; and the decisions of courts in the various states in regard thereto should have but little weight except when applied to the special statute to which they refer. The statute, under which the liens in the present action were filed, is entirely silent upon the question of the assignability of said liens; and in our opinion no substantial reason exists why, under the law and upon the facts shown

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by the evidence in this case, such liens should not be assignable so as to give a right of action in the assignee.

The liens were assigned to plaintiff to enable him to bring the suit in his own name for the benefit of each lien-holder. Each assignor was to bear his proportion of the expenses incurred in the prosecution of the suit, and each to share *pro rata* in the amount eventually realized. The plaintiff, as the agent of the several lien-holders, might have proved up their liens without the assignment. But an assignment having been made, we think the assignee has the same right to enforce these liens. By executing the assignment it is evident that it was the intention of each lien claimant to preserve and enforce his lien. The plaintiff need not have brought the suit to foreclose any but his own lien and then by pursuing the provisions of the statute would have had the right to exhibit proofs as to the others. Stats. 1861, 37, Sec. 7; *Mars v. McKay*, 14 Cal. 128. But by bringing suit upon all the liens (doing more than was necessary) he did not, in our judgment, lose the right to have the assigned liens enforced. *Elliott v. Ivers*, 6 Nev. 290.

In California it is held that the statute creates a sort of mortgage or security, which follows the original debt or obligation. *Brock v. Bruce*, 5 Cal. 280; *Ritter v. Stevenson*, 7 Cal. 389. In the case of a mortgage it is held that the debt is the principal thing, the mortgage being but an incident; that independent of the debt the mortgage has no assignable quality. Upon this theory appellants contend that if the liens were assignable they could not be transferred without an assignment of the debt which the liens secured and claim that no such assignment has been made. The assignment is endorsed on each lien as follows: "For and in consideration of the sum of one dollar in hand paid by Wm. Skyrme, the receipt whereof is hereby acknowledged, I do sell, assign, transfer and set over to said Wm. Skyrme the within lien and all my rights thereunder." Without conceding the doctrine that a mechanic's lien is to be treated in every respect like a mortgage, we consider that the language used in the assignment is broad enough to include

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the debt. The true principle of sound ethics is to give this language the sense in which the person making the assignment, as well as the person accepting it, intended it to have. When the assignors transferred their liens and all their rights thereunder, they meant the right to foreclose the lien and enforce the debt "in any court of competent jurisdiction." The law provides that the mechanic, miner and material man shall have a lien for his work and labor done or materials furnished by complying with the statute. In this respect a mechanic's lien is different from a mortgage executed by the consent of the parties, and also different from a vendor's lien which arises from principles of equity independent of the statute. In the case of a mechanic's lien the evidence of the debt, that is the account of the lien claimant verified by his oath, is a part of the instrument. The paper we call a lien is simply evidence that the acts required by statute have been performed, and therefore that the lien created by the statute has attached. Is not the assignment of this paper, by whatever name it may be called, *with all rights thereunder* as much an assignment of the debt as it is of the lien?

No particular words are necessary to constitute an assignment of a debt. If the intent of the parties to effect an assignment be clearly established, that is sufficient. If the word *account* had been used instead of *lien* the objection of counsel would probably not have been made. To hold that these liens were not properly assigned would be to allow the merest technicality to triumph over justice. The assignment of the debt or account and the lien would undoubtedly be held good as between the parties to the assignment, and we do not think the defendants are in a position to complain because the parties did not use apt words to express their meaning. In arriving at the intention of the parties we have been governed solely by the words of the assignment and the acts of the parties at the time the transfer was made, and have disregarded the several exhibits from 40 to 46 inclusive. The plaintiff must stand or fall upon the merits of the assignments as they existed when suit was brought.

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The offer of these exhibits in court was an evidence of weakness on the part of plaintiff, which it was unnecessary to exhibit; and their admission in evidence was an immaterial error which in no wise affects the decree.

It is contended by appellants' counsel that the law under which the liens were claimed having been repealed before the commencement of this suit the right to enforce the liens was lost. In other words, that the liens, being nothing but a remedy created by the legislature, were liable at any time to be abolished, and hence that the liens fell with the repeal of the laws. Without considering the question whether such liens could be destroyed by legislative action, we are clearly of the opinion that the act of March 4, 1871, was not intended by the legislature to have any such effect. The act re-enacts many of the provisions of the law of 1861 and of the several acts amendatory thereto. Its general provisions with reference to filing and enforcing the liens is substantially the same. The law was evidently passed for the express purpose of embracing within its provisions all laws theretofore existing upon the subject of mechanics' liens. The act of 1871 took effect simultaneously with the repeal of all former acts and was doubtless intended to be substituted in the place of all laws existing upon the same subject prior to the time of its passage, so that instead of abrogating and annulling prior laws it had the effect to continue them in force in so far as existing rights thereunder were concerned.

Judge Hillyer, in the district court of the United States for the State of Nevada, has given to this law of 1871 the same construction. In *Sabin, Assignee, v. Conner, in Bankruptcy*, the learned judge says: "It is plain that the legislature never intended to destroy rights acquired under the old laws, but simply to consolidate all the laws upon the subject of mechanics' liens and to extend it to some objects not before included." The same principle has been decided in *Steamer Gazelle v. Wells Lake*, 1 Oregon, 119; *Wright v. Oakley* 5 Met. 406; *Steamship Co. v. Joliffe*, 2 Wallace, 458. The

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remarks of C. J. Shaw upon the repeal of the statutes in Massachusetts are applicable to the present case. He said: "In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts, which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones. In order to construe them correctly we must take the whole of the revised statutes, together with the act of amendment and the repealing act, and consider them in reference to the known purposes which the legislature had in view in making the revision."

The next objection of appellants is made upon the following state of facts, viz: On the 26th day of October, 1870, twenty-nine of the lien claimants (and ten of them on the 29th of October) filed a joint lien for their work and labor done and performed upon the mine owned by the Occidental M. and M. Co. Afterwards, on the twenty-sixth and thirtieth of November, 1870, the individual liens, to foreclose which this suit was brought, were filed by each of said lien claimants. Upon this state of facts appellants claim that the lien claimants could file but one valid lien and that the joint lien having been filed more than six months prior to the commencement of this action and no credit having been given, the lien was lost. The testimony shows that in many instances each claimant made a contract for himself; some commencing at one date and some at another; some working for \$3 50 per day, others at \$4. In some instances contracts were made with several of the claimants, but in all

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these cases the settlements were made separately with each contractor, and occasionally some of the contractors received more than the others. There is no provision in our statute for filing joint liens where no community of interest exists, and we are therefore of opinion that the several lien claimants had the right to file their individual liens, treating the joint liens as if none such existed. *Young v. Chambers*, 15 Penn. State R. 267.

Appellants next contend that the individual liens are taken to secure distinct jobs of work and include separate periods of employment, and therefore that several of the liens are invalid because not filed within sixty days after the completion of each job or contract. A brief review of the testimony will show the character of the work. S. Schlewick, the foreman of the mine, after testifying to the amount and character of work performed by each lien claimant, says: "All the work which I have mentioned as having been done by the various parties as miners was done upon the ledge described in the complaint. * * * The contract work * * * was none of it done by the day. The only way that I get at the amount coming to the different men on contract is dividing the amount by the number of men in the contract. The winze contract I made with all the parties to the contract. I cannot distinguish between the contracts which I have mentioned, in which I bargained with all the parties to the contract, and those in which I bargained with only a portion *for all*." C. Mayer, the bookkeeper, testified as follows: "The foreman, Simon Schlewick, furnished me the amount of contract, how much per foot, the number of feet finished, and I worked it out and divided it amongst the men in the contract, whose names he gave me. I was informed by Simon Schlewick that these amounts were due for work done on the Occidental mine." On cross-examination by defendants this witness said: "I don't know whether the \$187 50 due Ed. Bowden was due on one or more contracts. * * * I cannot say from the books or otherwise that the amount due Bowden was for one or two jobs. The books do not show, neither do I know, when the work was

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finished on any of the contracts I have mentioned." On re-direct examination by plaintiff this witness said: "Each man's account for day labor and contract was kept in one account, but the entries in the journal show what was for day's labor and what was for contract work."

The details of the testimony show that a half dozen contracts were taken by a dozen or more of the lien claimants, some taking two or more contracts, others but one. These contracts were completed, respectively, May 8, June 11, July 22, August 15, and during the month of October, A.D. 1870. Two were unfinished in October, when the owner of the mine suspended and discharged all the men. The miners at work by contract, when their contracts were completed, either took a new contract or commenced work by the day in the same mine. The liens include the amount due to each claimant for his entire labor under the contracts and by the day.

The manner in which the work was conducted in the Occidental mine is quite common in many of the mines in this State. In the prosecution of the work it is necessary to run tunnels and cross cuts, and sink winzes; and while as a general rule the laborers are employed by the day, it is often the case that some of them will take a contract to do this kind of work at a stipulated price per foot, and within a few days after their contracts are completed either go to work by the day or take other contracts in the same mine. It would be a harsh and unreasonable rule of construction in these cases to hold that the statute required separate liens to be filed for each contract to enable the laborer to secure his wages. The injustice of such a rule would be greater to the mine owner than the laborer. It would destroy the credit, necessary at times to have in order to continue operations on the mine, or add unnecessary costs and litigation by filing and foreclosing a multiplicity of liens.

In the case at bar there was not in reality any new employment. The character of work was the same, viz.: labor and work done on the mine. The amount to be paid varied with the peculiar character of the work at different times.

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We have carefully considered all the testimony and are satisfied that there was not in the eye of the law any such stoppage or change of work as created independent jobs or contracts requiring the filing of separate liens. The miners worked under the direction of the foreman of the Occidental M. and M. Co. as well under the contracts as when working by the day. We think it was proper to include the work done under the contracts with the work done by the day, and to treat the employment as one continuous transaction for the purpose of ascertaining the time within which the liens should be filed. *Singerly v. Doerr*, 62 Penn. State R. 12; *Fitch v. Baker*, 23 Conn. 567.

It is next insisted by appellants that the lien of Wm. Tonkin does not upon its face entitle the party claiming it to any lien. It is recited in said instrument that "said lien is to secure the performance of a contract for the payment of seven hundred and thirty-nine $\frac{88}{100}$ dollars in U. S. gold coin, as specified by note. [A copy of which is set out in the lien.] The above note was given as a settlement according to a verbal agreement for labor done as a miner in extracting ore from and working in said Occidental mine, from the last day of February, A.D. 1869, to the fifth day of October, 1870." While we think the better practice would be to state more clearly the character of the work, by whom and for whom done, yet, viewed in the light of the statute requirements, we do not consider that the statement is so defective as to prevent the enforcement of the lien. See Stats. 1867, 48, Sec. 1; Stats. 1861, 35 and 36, Secs. 2 and 5; *Brennan v. Swasey*, 16 Cal. 142; *Selden v. Meeks*, 17 Cal. 129.

As a further objection to this lien it is claimed: first, that the note was received by Tonkin in full payment of the debt; second, that if received "only as a conditional extinguishment of the debt for work, it became upon its sale and transfer to plaintiff *an absolute extinguishment of the debt and waiver of the lien.*" We have carefully examined the authorities cited in support of this position. In *Scott v. Ward*, (4 Iowa, 112) it was held that "if the note had been nego-

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tiated or had passed from plaintiff's control to the ownership of another the lien given by statute would be lost. Such transfer would be regarded at law as a waiver of the lien." In the same case the court say: "It has repeatedly been decided by this court that the acceptance of a note is not a relinquishment of a mechanic's lien." The notes referred to had not been actually negotiated, and the opinion of the court simply decided that the court below erred in refusing to admit the lien in evidence, the indorsement of the notes being in blank and having been erased. In *Morrison v. Steamboat Laura*, 40 Mo. 261, the plaintiff had accepted notes and then discounted them, and afterwards took them up and brought suit to enforce the lien. The plaintiff had the notes at the trial and offered to cancel them. Walker, J., said: "According to the well settled principles of law the lien was neither waived or destroyed." The plaintiffs "had lost none of their rights and were fully entitled to their lien." In *Raymond v. Strobel*, 24 Ills. 113, where it was insisted "that by taking the note of the owner of the premises the petitioner lost his lien," the court say: "While the taking of other security, either on property or that of individuals not parties to the transaction, would have the effect to discharge the premises from the lien, yet the mere settlement and adjustment of accounts and taking the note of the owner of the premises who incurred the debt is in no sense a change of security, or security of any description. The note when taken is only evidence of the debt, and cannot be held to affect the lien."

The note under consideration was taken by Tonkin from the owner of the mine upon which the work was done. It was taken upon a settlement and adjustment of the accounts as evidence of the amount due. Tonkin's lien was assigned the same as the others, to enable plaintiff to bring this suit in his name. The note was indorsed in blank by Tonkin and delivered to the attorney who commenced this action. The note remained in the possession of said attorney until the day of trial, when it was offered and admitted in evidence to support the lien, and was filed as an exhibit in this

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case. Under the law, as applied to the state of facts shown by this testimony, no rights of Tonkin or plaintiff were relinquished or lost by the acceptance or transfer of this note.

We have examined all the objections made to each individual lien and consider them without merit. The statute in regard to mechanics' liens was intended by the legislature as a protection to material men, contractors and laborers, and lien claimants are required substantially to comply with its provisions in order to obtain the security which it affords. As was said in *Putnam v. Ross* (46 Mo. 338): "The whole course of legislation on the subject shows that it has been the intention of the legislature to avoid unfriendly strictness and mere technicality. The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions."

Having this object in view we have endeavored to carry out the intention of the legislature, and to give the lien claimants the benefits they are entitled to under the law, by a fair and liberal construction of the statute.

The order appealed from and the decree of the district court are affirmed.

THE STATE OF NEVADA, RESPONDENT, v. J. BEDFORD
ROBERTS, APPELLANT.

NO VALID CONVICTION EXCEPT AT LEGAL TERM OF COURT. Where a person was tried and found guilty of crime at a term of the district court, which was not authorized by statute: *Held*, that such conviction was void.

NO LEGAL TERM OF COURT EXCEPT AT TIME PRESCRIBED. Where the June term of a district court was fixed by statute to commence on June 5; but the judge did not make his appearance until June 22 and then held what purported to be the June term, without however having ordered an adjournment as provided by law (Stats. 1869, 136): *Held*, that the June term had lapsed and that all the proceedings were *coram non judice*.

PROVISION TO PREVENT LOSS OF TERM. The purpose of section 52 of the act concerning courts and providing for adjournments (Stats. 1869, 136) is to prevent the loss of a term in case of the failure of the judge to attend on the first day of the term.

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TIME AND PLACE OF HOLDING COURTS—CERTAINTY. The intention of the legislature in prescribing the times for the commencement and the place for holding the terms of the district court is to attain certainty.

NO VALID JUDGMENT EXCEPT AT PRESCRIBED TIME AND PLACE. It is indispensable to the validity of a judgment that it be rendered at the time and place prescribed by law.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The defendant, together with one Charles Beaver, was indicted for robbing Walter M. Thomas of \$93 in coin on January 31, 1871. The cause was to have regularly come on for trial at the June term, 1871, of the district court at Reno. It was called and the trial proceeded on July 10. On motion of the district attorney, Beaver was discharged on the understanding that he was to be used as a witness for the State; and Roberts was convicted of robbery as charged and sentenced to imprisonment in the State prison for the term of ten years.

On the calling of the case for trial the defendant's counsel objected to proceeding on the ground that the court had no jurisdiction for the reason that there was no legal term. In support of their objection they showed that the day prescribed by law for the commencement of the June term, 1871, was June 5 and the place Reno; that no such term of court was held or called to be held in Reno prior to June 22; and that no judge had before the expiration of one week from June 5 ordered the court to be adjourned to any day within the June term, "except that said court was called at Washoe City and there adjourned and then held from day to day during said week and up to and including the 21st day of June, 1871." The objections were overruled and defendant excepted.

A motion for new trial having been overruled, defendant appealed from the judgment and order.

R. H. Taylor and *A. C. Ellis*, for Appellant.

L. A. Buckner, Attorney General, for Respondent.

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By the Court, BELKNAP, J.:

The legislature of the State of Nevada at its fourth session appointed the first Monday in January, June and October as the days for the commencement of the terms of the district court in the County of Washoe. The district judge did not appear at Reno, the county seat, for the purpose of holding the June term of court until the twenty-second day of June; nor was there any pretense to adjourn court at any time prior to that date in compliance with the provisions of section 52 of the act concerning courts of justice and judicial officers, as amended March 5, 1869. At the term thus holden the defendant was tried; and the only question necessary to a determination of this appeal is whether he was tried at a legal term of court.

Amended section 52, referred to, reads as follows: "If no judge attend on the day appointed to hold the court before noon, the sheriff or clerk shall adjourn the court until the next day at ten o'clock, and if no judge attend on that day before noon the sheriff or clerk shall adjourn the court until the following day, and so on from day to day for one week; if no judge attend for one week the sheriff or clerk shall adjourn the court for the term; *provided*, before the expiration of one week the judge shall order by letter or telegram to adjourn the court to any day within the term, the sheriff or clerk shall adjourn the court to the day so ordered."

The purpose of this statute is to prevent a loss of the term in case of the failure of the judge to attend on the first day of the term. "Leave this section out of the statute and the loss of a term is the consequence of a failure of a judge to appear on the day appointed for holding the court." *People v. Sanchez*, 24 Cal. 17. Hence the term was lost unless saved by the proceedings at Washoe City.

Section 18 of the act before referred to provides that "the terms of the district court shall be held at the county seat of the several counties." In exceptional cases the judge is authorized to hold court at a place other than the

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county seat; but it is not pretended that any of the statutory exceptions existed in this case. The intention of the legislature in prescribing the time for the commencement and the place for holding the terms of the district court was to attain certainty. The principle of a fixed notice by the legislature rests upon public convenience; otherwise suitors, grand and trial jurors and others interested in the proceedings of the court would be kept in attendance upon an uncertainty of time and place. "Certain fixed times and places" were said by Spelman to be essential to the existence of a court; and these essentials have been recognized by lexicographers, text-writers and judges ever since his time. It is indispensable to the validity of a judgment that it be rendered at the time and place prescribed by law: the proceedings in this case were therefore *coram non judice* and void.

The judgment of the district court is reversed, and the cause remanded for a new trial.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA.

APRIL TERM, 1873.

THOMAS TAYLOR, RESPONDENT, *v.* WILLIAM HENDRIE, APPELLANT.

STATUTE OF LIMITATIONS—PART PAYMENT NO ACKNOWLEDGMENT. Part payment under our statute of limitations does not avail to raise its bar.

REQUISITES OF NEW PROMISE OR ACKNOWLEDGMENT. The acknowledgment or promise in writing, contemplated by the statute of limitations (Stats. 1861, 31, Sec. 30) to take a case out of its operation, must be made by the party to be charged or his authorized agent and to some one having interest or authority to receive it.

NEW PROMISE MUST BE TO SOME ONE AUTHORIZED. Where Hendrie, being indebted on a note held by Huber, sent money to Curtis and wrote him a letter to apply it on the note and stating that he would soon send the balance: *Held*, that such letter was not a promise to Huber and not sufficient as evidence of a new or continuing contract to take the case out of the operation of the statute of limitations.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

This was an action by the plaintiff as administrator of the estate of John Huber, deceased, to recover \$402 52, on a promissory note, made November 2, 1866, and more than four years before the commencement of suit by defendant

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to Thompson Richards, and by him indorsed to plaintiff's intestate. The cause was tried by the court below without a jury and resulted in findings and judgment in favor of plaintiff—it being there held that the letter of defendant to Curtis, set out in the opinion, was a sufficient acknowledgment to take the case out of the operation of the statute of limitations. Defendant moved for a new trial, but his motion was overruled; and he then appealed from the judgment and order.

J. O. Darrow, for Appellant.

The statute of limitations in reference to a new promise to take a case out of its operation clearly contemplates that the writing must be a *contract* made for the purpose of taking the case out of the statute. Formerly it was held that a promise to a stranger would be sufficient; but since the courts have come to regard the statute as one to be observed rather than one to be evaded, a different rule has obtained and it is held that like any other promise having legal force and sanction it must be made to the party seeking its benefits or to some one authorized to act for him. A promise to a stranger is insufficient. See *Keener v. Crull*, 19 Ill. 191; *Norton v. Colby*, 52 Ill. 204; *Kyle v. Wells*, 17 Penn. St. 286; 3 Strob. 171; 6 Geo. 21; 10 Watts, 261; 10 Barr. 130; 7 Yerg. 543. See also, *Wilcox v. Williams*, 5 Nev. 216, and cases there cited.

As it does not appear that Curtis was the agent of Huber or had any interest whatever in the matter referred to in Hendrie's letter, that letter, even if it had contained a promise, would not have removed the bar of the statute.

N. D. Anderson, for Respondent.

It seems to us a misapprehension of the law to suppose that the writing intended by the statute must be a "contract made for the purpose of taking the case out of the statute." The statute only requires that the evidence of the acknowledgment or promise must be "in writing,"

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and that it must be "signed by the party sought to be charged." No precise form of words is necessary. In this case there is not only an acknowledgment "in writing" and "signed by the party sought to be charged" that the note has not been paid, but an express promise to pay it.

Again, this is not a promise to a mere stranger. Even such a promise might be good; but it is to be noted that the letter from Huber to Hendrie was the motive for Hendrie's writing to Curtis and sending him five hundred dollars. He constituted Curtis beyond any question his agent; and what he could do himself he could do by his agent; and what was done by Curtis when he was acting for him in this transaction was the same as if done by himself. In fact Curtis was acting as the agent of both Hendrie and Huber. In no sense can he be considered a mere stranger to whom Hendrie made this acknowledgment. But in any view of the case an acknowledgment is an independent fact, which wheresoever and to whomsoever made, if clear and unequivocal and in writing and signed by the party sought to be charged, defeats the operation of the statute. See *Whiting v. Bigelow*, 4 Pick. 109; *Woodbridge v. Allen*, 12 Met. 471; 2 Greenleaf on Ev. Sec. 441; *Ashley v. Vischer*, 24 Cal. 322.

By the Court, WHITMAN, C. J.:

To this action on a promissory note the appellant interposed a plea of the statute of limitations. To take the case therefrom the respondent relied upon the following letter:

"HAMILTON, Jan. 14, 1869.

"MR. A. A. CURTIS:

Dear Sir:—I received a letter from some one, I suppose it was from Huber, it had no signature. I send you five hundred dollars and want you to send me his note and apply the balance on Richards' note and I will send the balance on receipt of your letter.

Yours truly,

W. HENDRIE."

Upon the Richards' note (the one in suit), of which at the date of the letter quoted the deceased was the holder, two hundred and five dollars were paid by Curtis; and this completes the evidence.

Part payment under our statute does not avail to raise its bar. *Wilcox v. Williams*, 5 Nev. 206. It does not appear that Curtis was authorized to or did make any such promise as the statute requires. Nor can the declaration to Curtis by appellant be considered such promise. The statute of this State is clear and explicit; it relieves the necessity of considering the many decisions, to some extent conflicting, of what is an acknowledgment or promise sufficient to avoid the statutory bar. It is provided that "no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this statute, unless the same be contained in some writing signed by the party to be charged thereby." Stats. 1861, 31, Sec 30.

It is evident that the statute contemplates a new or continuing contract, to be evidenced by a written acknowledgment or promise; such acknowledgment or promise to avail must be made by the party or his authorized agent to some one having interest or authority to receive the same; and so it follows that the promise so-called made to Curtis can not satisfy the statute, being made to one who at best was only the special agent of appellant for a specific purpose, and in no sense the agent of respondent's decedent, but to him a stranger.

But apart from this statute, which is to some extent peculiar as has been shown in *Wilcox v. Williams*, *supra*, the weight of authority is to the same effect. It was well said in *Kyle v. Wells*, 17 Penn. State Rep. 286: "There is a maxim in the Roman law *per extraneam personam nihil nobis acquiri potest*, through a stranger we can acquire no rights; and though this maxim is not found in our law, yet its principle is at the foundation of all our rules as to the priority of the contract and estate and as to matters *inter alios actæ*. If then the defendant had expressly told the witness that he

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would call and pay, this would have been but the expression of a determination revocable at pleasure and would have created no legal duty. It is a perversion of the word promise to apply it to a declaration made to one who has no interest in or connection with the subject spoken of, and we cheat the law and morality too of their rights when we distort the meaning of words in order to reach a desired conclusion." 1 Bouv. Inst. 339; See also, *Keener v. Crull et ux.*, 19 Ill. 189; *Gillingham v. Gillingham*, 17 Penn. State, 302; *Bradford v. James*, 3 Strob. 171; *Hill v. Kindall*, 25 W. 528; *Bloodgood v. Brown*, 4 Seld. 362.

As there was no sufficient acknowledgment or promise to evidence a new or continuing contract, the appellant's plea was good and should have been sustained.

The order and judgment against him are therefore reversed and the cause remanded.

HAWLEY, J., having been of counsel for appellant, did not participate in the foregoing decision.

J. F. PEACOCK, RELATOR, v. JOSEPH LEONARD, ON
MOTION TO AMEND JUDGMENT.

AMENDMENT OF JUDGMENT OF SUPREME COURT. A judgment rendered at a previous term of the Supreme Court can only be amended upon something appearing in the original record.

PROCEEDINGS ON CERTIORARI OF APPELLATE NATURE. Proceedings upon *certiorari* for the review of the action of an inferior tribunal are of appellate nature, though not pursued in the ordinary and technical form of appeal.

WRIT OF RESTITUTION, WHEN ISSUED BY SUPREME COURT. Where the Supreme Court on *certiorari* annulled the proceedings of a district court under which the relator had been turned out of possession of certain property: *Held*, that in addition to annulling the proceedings of the court below, the Supreme Court could properly issue a writ of restitution to restore the relator to possession—such writ being necessary and proper to the complete exercise of its appellate jurisdiction.

By reference to the case of *J. F. Peacock, Relator, v. Joseph Leonard* on *certiorari*, ante 84, it will be seen that certain

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proceedings of the District Court of the Second Judicial District, whereby Peacock had been turned out of possession of certain property in the town of Reno, Washoe County, were completely annulled. On the going down of that decision, the district court attempted to issue a writ of restitution; but on appeal (see *Leonard v. Peacock*, ante 157) such action of the court below was held utterly void on the ground that it had no jurisdiction for any positive or affirmative action whatsoever. Peacock then made this motion to amend the judgment of the Supreme Court in the *certiorari* cause, so as to give him costs and also to include a writ of restitution to restore him to possession.

Haydon & Cain, for Relator.

I. The Supreme Court can at any time amend its judgments *nunc pro tunc* in a proper case, where the record of the case discloses proper grounds therefor. *Hegeler v. Henc-kell*, 27 Cal. 491. Here the record shows that Peacock in his petition for *certiorari* prayed to be restored to all things that he may have lost by occasion of said judgment and writ of restitution issued and executed by virtue thereof.

II. If a court having jurisdiction over the subject-matter annuls and declares void a judgment of an inferior court, it can enforce its judgment also in all respects and order re-restitution. *Paul v. Armstrong*, 1 Nev. 82; *Kennedy v. Harner*, 19 Cal. 374; 3 Pick. 31; 10 Johns. 304. In this case the Supreme Court may issue all writs necessary or proper to the complete exercise of its appellate jurisdiction. Const. Art. VI. Sec. 4. Here the proceedings on *certiorari* were in the exercise of its appellate jurisdiction. *People v. Turner*, 1 Cal. 143; *Marbury v. Madison*, 1 Cranch, 137; *Curtis v. McCullough*, 3 Nev. 214.

III. The judgment roll in the *certiorari* case is in the Supreme Court as in a court of original jurisdiction. *Leonard v. Peacock*, ante 157. The Supreme Court therefore has general jurisdiction over the case, and hence can do all things necessary to render the decision effectual.

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Having general jurisdiction over the subject-matter and power to enforce its judgments, it has a right to inquire what property and rights have been lost by reason of the void judgment and to restore the party to his rights.

Webster & Knox, for Respondent.

I. Except in case where a clerical error or misprision is shown in the entries upon the record, this court has no jurisdiction to amend its judgment after the term at which it was rendered has expired, and after ten days from the date of the entry of judgment. To hold otherwise would be to violate the well settled principles of jurisprudence. It would be saying that there shall be no end to litigation. See *Bullion Co. v. Croesus Co.* 3 Nev. 336; 4 Cal. 280; 8 Cal. 521; 28 Cal. 335; *Baldwin v. Kramer*, 2 Cal. 582; *State v. First Nat. Bank*, 4 Nev. 359; *Huntingdon v. Finch*, 3 Ohio State, 445; 1 Ohio, 375; 3 Ohio, 15; 17 Cal. 706.

II. On *certiorari* this court may affirm, annul or modify the proceedings below. Practice Act, Sec. 448. It will only inquire whether the inferior court exceeded its jurisdiction. *People v. Dwinelle*, 29 Cal. 632; *People v. County Judge, etc.*, 40 Cal. 480; *State v. Co. Commissioners*, 6 Nev. 100; 5 Nev. 317; *Maynard v. Raily*, 2 Nev. 313; 5 Mass. 423; 13 Pickering, 196. It will not review its own action except upon rehearing granted, in which case final judgment is stayed. *Vansickle v. Haines*, ante 164.

III. It is to be presumed that this court in the *certiorari* case passed upon all the questions raised in that proceeding, and rendered such a judgment as it was authorized to do, omitting no duty imposed upon it by law. If it erred in its decision the relator should have applied for a rehearing at the same term or within the time allowed. Not having done so he is concluded from having the case re-opened.

By the Court, WHITMAN, C. J.:

Motion is made to amend the judgment in *Peacock, Relator, v. Leonard* on *certiorari*, ante 84, by giving costs in favor of the relator on the proceedings in the district court. Could the judgment in any case be thus amended it could only be so at this time upon something appearing in the original record. The papers sent up on *certiorari* show a judgment for costs against relator, but the return of the sheriff states expressly that nothing was made out of him. What he expended and would in an ordinary action have had the right to tax against respondent does not appear; so even were it possible in such case to have afforded means of restitution upon annulling the action of the district court, this is not that case, and herein the relator has by the judgment on *certiorari* all the relief to which he proved himself entitled.

The further relief prayed in the motion stands upon a different footing. It appeared by the papers referred to that relator had been dispossessed of certain real property by the writ of the district court; and he asked in his petition to be restored to what he had lost. No special order was made for a writ from this court, and now motion is made to that end. It is unnecessary to consider whether this court may issue any writ in aid of its original jurisdiction (which to a certain extent is evidently granted by the constitution) other than those therein enumerated, as proceedings upon *certiorari* for the review of the action of an inferior tribunal are of appellate nature, though not pursued in ordinary and technical form of appeal. *People v. Turner*, 1 Cal. 143.

So the only question here is, can the court issue such a writ as will make its judgment effective? Ordinarily it acts in a given case through a district court, but such action is here impossible. *Leonard v. Peacock*, on appeal, ante 157. It therefore necessarily follows that the writ must issue herefrom or not at all; and if not, then a judgment has been pronounced which cannot be executed or put in process of execution, as the restitution of relator is the logical and only

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practical sequence of the annulment of the action of the district court. The law does not favor any such anomaly. A writ of restitution in favor of relator is required to carry out and fulfill the judgment of this court. This proceeding upon *certiorari* being, as has been seen, of appellate nature, the required writ has the sanction of the letter of the constitution as one "necessary or proper (from this court) to the complete exercise of its appellate jurisdiction."

Let the writ issue in ordinary form, directed to the sheriff of Washoe County.

THE STATE OF NEVADA, RESPONDENT, v. THOMAS
L. BURNS, APPELLANT.

WHAT INSTRUCTIONS IN CRIMINAL CASES MUST BE EXCEPTED TO. Sections 386 and 387 of the Criminal Practice Act refer to two distinct classes of instructions; the former to those given by the court on its own motion; the latter to those asked by either party; and it is the latter only which are made by sections 426 and 450 a part of the record and deemed excepted to.

COURT MAY INSTRUCT JURY IN CRIMINAL CASE ON ITS OWN MOTION. On the trial of a criminal case the court has authority to charge the jury on its own motion.

COURT'S OWN CHARGE IN CRIMINAL CASE NOT DEEMED EXCEPTED TO. The charge given by a court on its own motion in a criminal case cannot be considered on appeal, unless it be properly carried up by bill of exceptions.

MISNOMER OF ACCUSED PERSON IN INDICTMENT. A defendant in a criminal case should be indicted by his true name when known; but if unknown, he may be indicted by any name that is sufficient to identify him; and when arraigned, if he do not give his true name upon request, he cannot complain of being tried by the name specified in the indictment or the name given upon arraignment, though subsequently proved to be not the true name.

WHEN ACCUSED CANNOT COMPLAIN OF WRONG NAME. Where a person was indicted by the name of Thomas Burns, and on arraignment gave his name as Thomas L. Burns, but after conviction moved for a new trial on the ground, supported by affidavit, that at the time of his arraignment he was ignorant he was improperly named in the indictment and that his true name was Thomas L. Byrne: *Held*, that he was sufficiently identified and had no good ground of complaint.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

Defendant was indicted for an assault with intent to commit murder by shooting at Francis M. Wilder on February 19, 1873. Having been convicted as charged, and his motion for a new trial having been overruled, he was sentenced to imprisonment in the State prison for the term of seven years.

The facts bearing upon the points decided are stated in the opinion.

T. W. W. Davies, for Appellant.

I. The defendant was indicted under the name of Thomas Burns, was tried under the name of Thomas L. Burns which he improperly answered was his true name upon his arraignment, and was sentenced as Thomas L. Burns after he had made affidavit on motion for new trial that his true name was Thomas L. Byrne and that when he answered on arraignment as to his true name he believed he was properly named in the indictment. We are aware that the general rule is that cases of misnomer must be taken advantage of by plea in abatement on arraignment; but as the defendant was not advised of the misnomer until after the trial, when the papers were examined for the purpose of moving for a new trial, the rule ought not to prevail in this case. And when the matter was brought to the attention of the court, it was error to sentence Thomas L. Byrne, when Thomas L. Burns had been indicted and tried—Byrne and Burns not being *idem sonans*. *Donnel v. U. S.* 1 Morris, 141; 10 East. 296; Kelyny Rep. 11.

II. The court erred in giving any instructions or charge to the jury, not having been requested so to do by either party. It is true the statute says the judge "may state the testimony and declare the law," but we take that as a limitation of his powers when he is requested to charge the jury by either party. Suppose the judge is requested by either or both parties to charge the jury, the extent of his power to charge them is to state the testimony and declare the law, and we believe that power is only legally exercised on request of one or both parties. Criminal Prac. Act, Sec. 355.

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III. Admitting that the court has the right to give a written charge to the jury without being requested so to do by either party, there certainly can be no good reason why such a charge should not be deemed excepted to and subject to review by the appellate court, the same as though it had been given by request. A charge given by the court of its own motion is presumed to be impartial and dispassionate; is and ought to be held in higher regard than any charge artfully drawn by attorneys, and ought to and does have more weight with a jury than any charge coming from an interested party. If a charge given by request is deemed excepted to and is subject to review as part of the record without a formal bill of exceptions, much more ought the same rule apply when the charge is given without request. There is no good reason why a distinction should be made between charges given by request or without request, as regards being deemed excepted to; and as in Sec. 426 Crim. Pr. Act, only written charges which have been presented, or given and refused, are deemed excepted to, we are strongly supported in our position that the court has no right to charge the jury of its own motion and that a charge given by request is the only charge authorized by law. We claim that we are further supported in this view by section 450 of the same act, which provides what papers shall constitute the record. In that section we find that the written charges *asked* of the court are made part of the record. If it was contemplated that the court could instruct the jury in a criminal action without being requested, why was so important a paper not made a part of the record? It could only have been excluded on the ground that the district judges were considered infallible, and that it would be useless to seek for error in a charge given by the court of its own motion.

IV. The principal grounds upon which defendant relied on his motion for a new trial being the errors in the instructions, we submit that the review of the instructions is indispensably necessary to enable this court to pass upon the question as to whether there was error in refusing defend-

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ant's motion. We therefore submit that the instructions are properly before this court, and we trust that they may be reviewed, believing that they are pregnant with error.

Wm. Patterson, for Respondent.

I. There is nothing for the court to look at or to decide in this case except as to the judgment. No exception was taken by appellant to the instructions given by the court; no bill containing any exceptions was settled or signed, nor does the transcript contain any evidence. Stat. 1861, 480, Secs. 421, 422, 423 and 424.

II. There is no provision of statute prohibiting the judge from instructing the jury whether requested by the parties or not. The presumption of law is, nothing to the contrary being shown, that the judge did his duty in instructing the jury. It is the duty of the judge to instruct the jury.

III. The defendant gave his name as Thomas L. Burns, he was tried and convicted under that name, and it makes no difference whether that is his name, or whether his name is John Smith. Stats. 1861, 464, Secs. 270, 271 and 272.

By the Court, HAWLEY, J.:

Appellant appeals from an order of the district court denying his motion for a new trial, and from the judgment. The record is presented without any bill of exceptions; and we are asked to review the charge of the court to the jury, provided we entertain the opinion that the court had authority to charge the jury of its own motion, a power which appellant's counsel denies.

In the *State v. Forsha*, ante 137, it was held, "that only such instructions as are asked of the court by the parties are to be considered a part of the record," and that "the charge given by the court of its own motion * * * can only be brought up by bill of exceptions." Sections 426 and 450 of the Criminal Practice Act and *People v. Hart*, Cal. Sup. Court, Oct. term, 1872, are cited in support of the

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decision. We think this decision is undoubtedly correct. Section 386 of the Criminal Practice Act provides that "In charging the jury the court shall state to them all such matters of law as it shall think necessary for their information in giving their verdict." Section 387 provides that "Either party may present to the court any written charge and request that it may be given. If the court think it correct and pertinent, it shall be given; if not, it shall be refused."

These sections refer distinctly to two different classes of instructions: first, to those given by the court of its own motion; second, to those asked of the court by either party. By section 426, it is provided that "When any written charge has been presented and given or refused, the question or questions presented in such charge need not be excepted to nor embodied in a bill of exceptions; but the written charge itself, with the indorsement showing the action of the court, shall form part of the record; and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions." Section 450 designates what shall constitute the record in a criminal action, and in the seventh subdivision specifies "the written charges asked of the court, if there be any." We have cited these various sections at length, in order to call the especial attention of the profession to the rule of practice therein prescribed.

We are satisfied, first, that the court has authority to charge the jury of its own motion; second, that such charge can only be considered by this court when properly embodied in a bill of exceptions. The statute will not admit of any other construction.

The argument of counsel that there exists no good reason why any distinction should be made between charges given by request of either party and the charge given by the court of its own motion, might with propriety be addressed to the legislature in support of an amendment to the law, so as to avoid this distinction. Our province, however, is to decide what the law *is*, not what it *ought to be*.

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Appellant next claims a new trial upon the ground that he was not indicted by his proper name. The record shows that he was indicted by the name of Thomas Burns; that upon arraignment he stated his true name to be Thomas L. Burns. After verdict he filed an affidavit stating that at the time of his arraignment he was ignorant of the fact "that he was improperly named in the indictment" and averring his true name to be Thomas L. Byrne. Appellant cannot contend that he is not sufficiently identified. In the minutes of the judgment the court refers to him as follows: "Thomas L. Burns *alias* Thomas L. Byrne, as you now state your name to be." Again, after referring to the indictment, the court says to appellant: "To this indictment you pleaded not guilty and at the time suggested that your true name was Thomas L. Burns without taking any exception to the orthography of your surname as it appears in the indictment."

Unquestionably, a defendant in a criminal action should be indicted by his true name when known. But if unknown, he may be indicted by any name that is sufficient to identify him. When arraigned he should give his true name; and if he fails to do so upon request, he cannot afterwards complain because the court proceeded to try him by the name specified in the indictment (or the name given upon arraignment) although subsequently proved to be not his true name. Criminal Practice Act, Secs. 270, 271, 272; *People v. Kelley*, 6 Cal. 213; *People v. Jim Ti*, 32 Cal. 64; *State v. White*, 32 Iowa, 19.

There is no error in the record. The judgment of the district court is affirmed.

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JOHN BECKMAN, RESPONDENT, v. ELLEN STANLEY,
APPELLANT.

RIGHT OF MARRIED WOMAN TO CONTRACT IN CASE OF ABANDONMENT. The exception to the common law disability of a married woman to contract or maintain a suit, in case of abandonment by her husband, does not apply except in case the abandonment is absolute and embraces a total renunciation of marital relations.

CONVEYANCE BY ABANDONED WIFE, HUSBAND MUST JOIN. The right of married women to alienate land in this State, whether their separate estate or community property, does not depend upon the common law, but upon our statutes; so that a wife's deed or mortgage, without her husband's joining in it, though he has abandoned her for years, is inoperative and void.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action to foreclose a mortgage for \$1518 45, on a certain lot on G street, in Virginia City. The mortgage was originally given by defendant, September 5, 1867, to T. J. Wood, and by him assigned to plaintiff. There was a judgment and decree as prayed. Defendant moved for a new trial, which was refused; and she then took this appeal from the judgment and order.

The facts in reference to the abandonment, upon which the decision of the court below was based, are fully set forth in the opinion.

Mitchell & Stone, for Appellant.

I. A mortgage executed by a married woman upon either separate or common property is not binding, although her husband may have abandoned her prior to its execution. The question is one which does not arise under the rules of the common law, but under the statutes of the State regulating the manner in which liens or incumbrances may be created upon the community property or the separate estate of the wife. Stats. 1864-5, 239, Secs. 6 and 9. The statute is prohibitory in its terms; and abandonment of the wife by the husband does not authorize her to execute a mortgage, which requires the signature of the husband to render it valid. *Maclay v. Love*, 25 Cal. 367; *Leonard v. Townsend*,

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26 Cal. 446; *Harrison v. Brown*, 16 Cal. 288; *Camden v. Vail*, 23 Cal. 633; *Spear v. Ward*, 20 Cal. 659; *Rhea v. Phenner*, 1 Peters, 480; 46 Ill. 344: 1 Bishop on Marriage and Divorce, Sec. 602; 44 Ill. 58.

II. Our statute makes no such exception as referred to in the California case of *Harrison v. Brown*, which authorized married women to transfer lands provided their husbands were absent from the State for one year next preceding the execution of the conveyance. Under our statute the prohibition is absolute; and abandonment by the husband cannot make that valid which by express terms of the statute is void without the husband's signature.

III. In taking the position that it matters not under the statute whether the husband has abandoned the wife or not, we do not concede that abandonment has taken place. While Stanley has been absent from the United States since 1859, still it appears that defendant has received frequent letters and remittances of money from him for her support, and none but the most friendly relations have existed between them during his absence. It is not, therefore, like one of those cases of total abandonment and desertion which occurred in the cases cited by counsel.

IV. A question of fraud can hardly arise in the case. If the mortgage is void for want of the husband's signature, no act of hers could make it valid in the face of the statutory prohibition, however fraudulent such act might be. If such an argument is entitled to any weight, it certainly could have been urged in the cases of *Harrison v. Brown* and *Rhea v. Phenner*. Those cases are in all respects parallel to the case at bar, and if followed by this court the mortgage should be declared void and the judgment foreclosing it reversed.

Jonas Seely, for Respondent.

I. A wife has no more disabilities and is entitled to no more exemptions under our statute than under the common law. The statute only provides a rule relating to property of certain married persons when they are so circumstanced that the courts will recognize the marriage relation. In

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other cases, as in this, the wife may make contracts and conveyances of all kinds, including mortgages; and she is bound by them, as well as the estate in her name covered by them. By the principles of the common law defendant would certainly be considered a single woman and treated accordingly. *Gregory v. Paul*, 15 Mass. 31; *Love v. Mayenbaum*, 16 Ill. 277; *Westcott v. Fisher*, 22 Ill. 390; *Smith v. Silence*, 4 Iowa, 321; *Benadam v. Pratt*, 1 Ohio State, 403; 5 Ohio St. 580; 17 S. & R. 130; 4 McCord, 108; 1 Bishop on Mar. and Div. Secs. 597, 598, 605-8. And being so considered, our statute relating to husband and wife has no application to this case.

II. To treat the defendant under the circumstances as a single woman would certainly be no wrong to the husband; for he years ago abandoned her, absented himself from her society, gave her over as a prey to the vicious and depraved and left her to obtain her living in the most disreputable manner. He no longer claims her as his wife and gives her none of the protection to which a wife is entitled. Nor is the defendant wronged by so treating her, for she has gained the advantages of a single woman even to the extent of acquiring the property in controversy apparently in that capacity; and in equity she ought to be held to the corresponding liabilities, including the payment of this debt. To refuse to treat her as a single woman would not only wrong the plaintiff; but the rule invoked by which for her to escape the payment of this debt, if established, would be a contrivance through which and by which the public would greatly suffer.

III. To say that under the facts of this case the defendant is liable on the notes (which appellant tacitly admits), and then under the same facts to say that the mortgage which is the only means for obtaining payment of the notes is void, is not in harmony with the rules of courts of justice in analogous cases nor the principles of equity.

By the Court, BELKNAP, J.:

This action is brought to foreclose a mortgage executed by the appellant in October, 1867. The answer avers that

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at the time of making the mortgage the defendant was a married woman. The cause was tried by the judge by whom the following facts were found:

"That said defendant was married to one Stanley on the 25th day of January, A. D. 1858, at Sacramento, State of California; that said Stanley left the United States and abandoned the defendant more than nine years ago, and has never since returned to the United States, nor has defendant seen said Stanley for more than nine years, nor has said Stanley ever been in Nevada.

"That defendant for eight years and more last past has resided in Virginia, Storey County, Nevada, and during all that time has been there engaged in the business of keeping and carrying on in her own name as a single woman, a boarding and lodging-house and brothel, and that she has purchased supplies therefor sometimes on credit and sometimes for cash and conducted all the business, including payment of bills, in her own name—the said Stanley not being in any way known or connected with any of said business or having any interest therein, or his existence or marriage with defendant known in or by the community where defendant has resided for the last eight years.

"That during the last nine years said Stanley has contributed something by way of remittances of money to the defendant for her support, but how much was not proven; and it was not found nor was it proven that the fact was known to any one but defendant; and that she has during said period received frequent letters from said Stanley."

The facts alleged in the complaint were also found. Judgment was entered for plaintiff, and from the judgment and an order denying a new trial this appeal is taken.

The exception to the common law disability of a married woman to contract or maintain a suit in case of abandonment by her husband has been recognized so frequently that it may be considered established. But the abandonment must be absolute and embrace a total renunciation of marital relations. In such cases courts have treated the deserted wife in all respects as a *feme sole*, allowed her to contract,

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sue and be sued, and to alienate lands without her husband. Upon this theory respondent relies to sustain the judgment. But the fact that the husband has contributed to the support of the defendant and frequently communicated with her, negatives that complete abandonment which the law requires before it will treat a married woman as a *feme sole*.

In our view of this case, however, the question of abandonment is immaterial to the validity of the mortgage. The right of married women to alienate land in this State, whether their separate estate or community property, does not depend upon the common law, but upon our statutes. Section 6 of the act defining the rights of husband and wife (Stats. 1864-5, p. 239) provides: "The husband shall have the management and control of the separate property of the wife during the continuance of the marriage; but no alienation, sale or conveyance of the real property of the wife, or any part thereof, or any right, title or interest therein, and no contract for the alienation, sale or conveyance of the same, or any part thereof, and no lien or incumbrance thereon, shall be valid for any purpose unless the same be made by an instrument in writing, executed by the husband and wife, and acknowledged by her as provided for in the acts concerning conveyances in case of the conveyance of her separate real estate." And section 9: "The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate." These sections are prohibitory; and any alienation of land by a married woman must be in the mode therein prescribed.

In *Rhea v. Phenner* there was a voluntary abandonment of the wife by the husband without having furnished her with the means of support. In his absence the wife acquired title to certain real estate, and when he had been beyond seas five years she executed a conveyance thereof. The court admitting the doctrine that a *feme covert* abandoned by her husband may contract debts as a *feme sole*, said: "But by the laws of Maryland, which must govern in this case, a married woman cannot dispose of real property without the

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consent of her husband; nor can she execute a good and valid deed to pass real estate unless he shall join her in the deed. The separate examination and other solemnities required by law are indispensable and must not be omitted." The deed was declared inoperative and void. 1 Peters, 106.

So in California, under a statute identical with ours, the court said: "The fact of the abandonment of the wife by her husband or his suffering her to act as a *feme sole* as stated in the bill, if such were the facts—whatever the effect of this may have been to render her personally liable for her contracts—neither gave her a right to bind his real property or her own by mortgage; and this seems to be an answer to the whole of the plaintiff's case. The legislature had a right to say how this sort of property should be bound, and it has, in effect, said that it should not be bound in this way." *Harrison v. Brown*, 16 Cal. 288.

The case at bar comes directly within the rule adopted by the supreme court of the United States in the first of Peters, and by the supreme court of the State of California; and we have been unable to find any authority to the contrary. The judgment and order of the district court are reversed and cause remanded.

THE STATE OF NEVADA, RESPONDENT, *v.* JOHN BERRYMAN, APPELLANT.

GRAND LARCENY OF ORE—SUFFICIENCY OF INDICTMENT. Where it was objected to an indictment for grand larceny of certain "silver bearing ore" that the property alleged to have been stolen savored of the realty: *Held*, that as "ore" in its usual acceptation meant something severed from the realty, there was a sufficient statement of facts in the indictment showing it to be personal property.

LARCENY OF ARTICLES SEVERED FROM FREEHOLD. The taking and carrying away of articles, which formed a part of the freehold, will not constitute a larceny unless an interval of time has elapsed between the acts of severance and asportation; but it seems only such an interval is necessary as that the two acts shall not constitute one transaction.

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WORDS "SILVER BEARING ORE" IMPLY SEVERANCE FROM FREEHOLD. The words "silver bearing ore," as used in an indictment charging grand larceny of it, mean a portion of vein matter, which has been extracted and separated from the mass of waste rock and earth, and imply severance from the freehold.

IRRELEVANT TESTIMONY—NO REVERSAL WHERE NO PREJUDICE. Irrelevant testimony should be excluded, but its admission will not vitiate a judgment of conviction if it appears that it could not have prejudiced the defendant.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

The defendant John Berryman, having been indicted jointly with Joseph Oxford for the crime of grand larceny and having on a separate trial been convicted as charged, was sentenced to the State prison for the term of one year. Oxford had previously been tried, convicted and sentenced to the same term. The defendant Berryman moved in arrest of judgment and also for a new trial, both of which motions were denied. He then appealed from the judgment.

It appeared from the testimony that the ore alleged to have been stolen was found concealed in the cabin of the defendants. It was a peculiar kind of ore and had evidently been taken from the mine of the Manhattan Company at a place where defendants had been employed to work for the company. When discovered, and while the ore was being removed from the cabin, Oxford stated that he and Berryman had bought it from one John Bone at the same time that they purchased the cabin from him. Testimony of this statement of Oxford was admitted on the trial of Berryman against his objections that it was made in his absence and was irrelevant as to him. But it further appeared in evidence that Berryman, upon his preliminary examination, had himself volunteered as a witness on his own behalf and had himself made the same statement. Further evidence showed that Bone never sold them any ore, and that it was not in the cabin when they purchased.

Among the instructions given were the following, asked by plaintiff:

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"If the jury believe that the defendant in this case took the ore in question from the Black Ledge Mine named in the indictment in small quantities and at different times, but that such taking was continuous and systematic, and that the object of defendant was to take a quantity of greater value than fifty dollars, and that he removed a little at a time only to escape detection to a place of concealment near the mine to be thence removed at his convenience, and that he did take away feloniously more than fifty dollars' worth of ore, this would be grand larceny and not a series of petit larcenies."

"The jury are instructed that in order to make the felonious taking of ore from a mine, it is not necessary that any particular length of time should elapse between the severance and the carrying away; and if they should believe that the defendant severed the ore from the mine, then laid it aside, and afterwards feloniously carried it away from the mine, the taking constituted the crime of larceny."

Among the instructions asked by defendant and given were the following :

"If the jury find that the ore alleged to have been taken by defendant was a part of the Black Ledge and that the same belonged to and savored of the realty, and there is no proof to convince the jury that any time intervened between the taking of the rock from the ledge and the removal from the shaft, then there is no larceny but one continuous act which constitutes only a trespass."

"If the jury find from the evidence that the defendant severed the rock from the ledge and carried it away immediately after the severance, making one continuous act, then there is no larceny."

George W. Baker and W. H. Davenport, for Appellant.

I. There was error in the admission in evidence of the statement of Joseph Oxford in regard to the possession of the rock alleged to have been stolen, as against this defendant, made when this defendant was not present—there

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having been no evidence previously offered tending to establish a conspiracy between defendant Berryman and Joseph Oxford to commit a crime. 1 Greenl. on Ev. Sec. 111. Aside from the fact that defendant and Oxford worked in the same mine together, there was no evidence in any stage of the proceedings tending in the slightest degree to establish a conspiracy sufficient to warrant the admission of the testimony in question.

II. There was error in overruling defendant's motion in arrest of judgment. The indictment is not sufficient. In order to constitute the crime of larceny there must be the felonious taking and carrying away of the *personal* goods of another. 4 Black. Com. 230; 4 Stevens' Com. 152. Mr. Russell defines the crime to be the wrongful and fraudulent taking and carrying away of the *mere personal goods* of another from any place with the intent to convert them to the taker's use. Thus it will be seen that an indispensable prerequisite to constitute the crime is that the property alleged to have been stolen be *personal property*, which alone is the subject of larceny. 2 Russ. on Crimes, 62. In the indictment here the property alleged to have been stolen not only savors of the realty, but it is not even alleged to be personal property. For anything that appears on the face of the instrument the ore might have been severed from the ground at the time of the taking charged, so that they together might have constituted but one continuous transaction, in which case *simple trespass* and not larceny was committed. *State v. Williams*, 35 Cal. 672; 2 Archbold's Crim. Prac. 377, 378; 2 Russ. on Crimes, 86.

III. It is just as reasonable to presume that the ore charged in the indictment was severed and carried away at the same time so as to constitute only a trespass, as that larceny was committed; and as upon the first no offense would be charged, it follows that the indictment is fatally defective for want of that directness and certainty required by our Criminal Practice Act. *State v. Williams*, 35 Cal. 672.

Geo. S. Hupp, for Respondent.

I. When a thief first severs, and afterwards steals, there may be a question what interval of time must elapse between the two acts in order for the stealing to amount to larceny. There seems to have been an opinion that the time intervening must at least amount to a day, because in law a day is not divisible. The better doctrine however is, that no particular space is necessary, only the two acts must be so separated by time as not to constitute one transaction. 2 Bishop C. L. § 679. In this case it was a question of fact for the jury to determine upon all the testimony whether there was any interval of time between the severance and the asportation of this ore from the mine. It was fully discussed before the jury; they passed upon it and found adversely to the defendant. One of two hypotheses is undoubtedly true. Berryman commenced digging the quartz from the mine when he went down in the morning, throwing it aside as it was extracted, and after the day's labor was closed picked it up and carried it away; or just before he left the mine he severed the quartz from its native bed, and without releasing his possession of it for a moment immediately carried it to his cabin. Upon the former hypothesis he was guilty of a theft—upon the latter, he committed only a trespass.

Upon a careful consideration of all the testimony the jury doubtless concluded that the first hypothesis was the true one and found accordingly.

II. What possible influence could the declaration of Oxford have produced upon the minds of the jury in the trial of Berryman? None at all. But it further appears that Berryman offered himself as a witness on his own behalf upon the preliminary examination before the justice, and then and there, of his own free will, testified under oath that he bought the ore from John Bone; and in the same connection afterwards stated, in reply to a question from his own counsel, that the ore was in the Bone cabin when he went into possession of it. An appellate court will never

disturb a verdict because improper testimony has been admitted where it is obvious that such testimony had no effect upon the deliberations of the jury; where the result would have been the same without such testimony; where the other evidence taken altogether fully justifies the verdict and where upon the whole case it is manifest that complete justice has been done to both the defendant and the State.

III. It is contended that the indictment in this case is fatally defective upon the ground that it does not state facts sufficient to constitute a public offense, for the reason that there is no allegation that the ore was personal property. The statute requires that words used in an indictment shall be construed in their usual acceptance in common language, except such words or phrases as are defined by law. Crim. Prac. Act, Sec. 241. *People v. Littlefield*, 5 Cal. 355.

Now what is the meaning of the word "ore" in its ordinary and general acceptance? We speak of ore in a sack, in a box, in a wagon, at the ore-house, on the dump, at the mill; and when we speak of "six hundred and ten pounds of ore," the only reasonable construction of the language is, that we are referring to the ore after its severance from the freehold. Otherwise, in charging the larceny of six hundred and ten pounds or bushels of apples or potatoes, would it not be necessary to go further and allege that at the time they were taken they had been plucked from the trees or dug out of the ground? It is plain that the words "six hundred and ten pounds" fairly imply that the ore had been extracted from its native bed and *weighed*; and it is plain that the indictment clearly and distinctly set forth the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what was intended. See also Webster's Dictionary, word "ore."

By the Court, HAWLEY, J.:

Appellant, having been convicted of grand larceny, moved to arrest the judgment upon the ground that the indictment

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did not state facts sufficient to constitute a public offense. The court refused the motion and appellant thereupon appeals from the judgment.

The indictment charges "that said defendants Joseph Oxford and James Berryman, on the thirtieth day of July, A. D. 1872, * * at the County of Lander in the State of Nevada, * * six hundred and ten pounds of silver-bearing ore, of the value of eight hundred dollars, of the property of the Manhattan Silver Mining Company of Nevada, a corporation duly organized and existing, * * did feloniously * * steal, take, and carry away. * * *"

It is claimed that the property alleged to have been stolen savors of the realty, and that there is no sufficient statement of facts in the indictment showing it to be personal property. The rule that things savoring of the realty are not the subject of larceny is stated by Sir Matthew Hale as follows: "If a man cut and carry away corn at the same time it is trespass only, and not felony, because it is but one act; but if he cut it and lay it by and carry it away afterwards it is felony." *Emmerson v. Annison*, 1 Mod. 89. The reasons given by Blackstone (4 vol. p. 232) for this distinction is that "Lands, tenements and hereditaments (either corporeal or incorporeal) can not, in their nature, be taken and carried away. And of things, likewise, that adhere to the freehold, as corn, grass, trees and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor, in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or

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constructive possession of any one but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at another time when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner or any one else has severed them."

The rule containing this subtle and unsatisfactory distinction is sustained by all the authorities. 2 Bishop on Cr. L. Sections 779, 780, 781, 782, and authorities there cited. There is some conflict in the authorities as to what interval of time must elapse between the acts of severance and asportation. The doctrine seems now to be settled, as laid down in Bishop, that no particular space is necessary, only the two acts must be so separated by time as not to constitute one transaction.

There is no substantial reason why the thief who, with felonious intent, takes and carries away apples from a tree, lead pipe from a building, or quartz rock containing precious metals from a mine, etc., etc., at one time, should not be punished the same as the thief who first severs the things from the freehold and afterwards goes back and carries them away. It is the criminal intention that constitutes the offense, and this intention is the only criterion by which to distinguish a larceny from a trespass. In our judgment the more sensible rule would be that as soon as the things which savor of realty are severed from the freehold, they become *eo instante* the personal property of the owner, the felonious taking and carrying away of which would constitute larceny.

So far as the present case is concerned, it is unnecessary to depart from the beaten path of precedent which the authorities have (as we think without substantial reason) established. In *The People v. Williams*, 35 Cal. 673, cited and relied upon by appellant, the indictment was for taking

and carrying away "from the mining claim of the Brush Creek Gold and Silver Mining Company * * fifty-two pounds of gold bearing quartz rock." The court said that the indictment was "entirely silent as to whether the rock was a part of a ledge and was broken off and immediately carried away by the defendant, or whether, finding it already severed, he afterwards removed it." The court held that the indictment was therefore capable of a double interpretation and for this uncertainty it was set aside. Larceny is the felonious taking and carrying away the personal goods or chattels of another, and if the facts stated in the indictment do not show that the *ore* was personal property at the time of the commission of the offense, the indictment can not be sustained. The character of the property, whether real or personal, must be determined by the statement of facts set out in the indictment. Sec. 241 of the Criminal Practice Act provides that "the words used in an indictment shall be construed in the usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning." The word *ore* is not defined by law, and must therefore be construed in its usual acceptation. The words "silver bearing ore," as used in the indictment, have reference to a portion of vein matter which has been extracted from a lode and assorted, separated from the mass of waste rock and earth and thrown aside for milling or smelting purposes, or taken away from the ledge. Webster gives the following definition: "Ore (mining). The ore of a metal with the stone in which it occurs, after it has been picked over to throw out what is quite worthless." In our judgment, the language used in the indictment necessarily implies that the ore had been severed from the freehold prior to the time of its asportation by Oxford and Berryman. We think that the act charged is stated with sufficient certainty to enable the court to pronounce judgment according to the right of the case, and that is all the statute, in this respect, requires. Crim. Prac. Act, 461, Sec. 243.

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From the testimony elicited at the trial, it appears that Oxford and appellant while engaged at work upon the Black Ledge owned by the corporation had (in small quantities and at different times) feloniously carried away therefrom the "six hundred and ten pounds of silver bearing ore." The question whether the acts of severance and of asportation were so separated by time as not to constitute one transaction was, under proper instructions, fairly submitted to the jury.

The court did not err in overruling appellant's motion in arrest of judgment. Appellant asks a reversal of the case upon the ground that the court erred in admitting the statement of Joseph Oxford, made after the commission of the offense, to the effect that the ore in question was bought from one John Bone at the same time that the cabin in which Oxford and appellant lived, and in which the ore was found, was purchased. This testimony was irrelevant and should have been excluded. 1 Green. on Ev. Sec. 111; *The State v. Ah Tom*, ante 213. But it is evident that appellant was not prejudiced by its admission. In fact the record shows that during his preliminary examination Berryman made substantially the same statement, which was properly admitted in evidence.

The judgment of the district court is affirmed.

J. B. FITCH, APPELLANT, v. ELKO COUNTY, RESPONDENT.

SHERIFF'S FEES IN DELINQUENT TAX SUITS. A sheriff cannot collect from a county his fees in delinquent tax cases commenced previous to the act of March 1, 1871, which provides for suits in which his fees shall under certain circumstances be so paid (Stats. 1871, 93)—such act not having any retroactive effect.

DELINQUENT TAX SUITS—WHEN FEES PAYABLE BY COUNTY. The act of March 1, 1871, amending the revenue laws in reference to delinquent tax suits (Stats. 1871, 93), contemplates the payment of fees out of the county treasury only in cases in which suits are brought by direction of the county commissioners.

STATUTORY CONSTRUCTION—PLAIN OBJECT OF LAW. Where the object of the legislature is plain and the language unequivocal, effect should be given to the intent of the law-makers.

NEW STATUTES APPLY TO NEW CASES. New statutes apply only to new cases, unless the contrary expressly appears.

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APPEAL from the District Court of the Ninth Judicial District, Elko County.

The facts are stated in the opinion.

Ellis & King, for Appellant.

The statute of 1871 amended the law of 1866, as well as Sec. 38 of that of 1864-5. The latter named section especially related to fees of officers; the law of 1866 in part to the same thing. The law of 1871 cannot stand if the law of 1866 does. Besides this, the judgment here and the sale of the property took place after the law of 1871 was enacted. Hence as to questions of costs and fees the law of 1871 must govern. The intent of the legislature is plain from the letter of the statute: but if not, all the provisions must be construed *in pari materia*, in which event the result is the same. *Thorp v. Schooling*, 7 Nev. 15.

The legislature had the power to regulate the disposition of the matter of costs in tax sales, and as to how the county would pay; and hence the argument that the statute of 1871 cannot apply to suits commenced before its passage but under which sales were made to the county after its passage does not apply to this case. It could not have been known, when these suits were commenced, that the county would be a purchaser at delinquent tax sale; and hence, as the statute plainly provides, the date of the sale and of the purchase by the county determines the applicability of the law of 1871 to questions of costs and the manner of payment, and not the time of the commencement of the action.

Lucas & Bigalow, for Respondent.

I. The complaint shows that the tax suits were commenced prior to the passage of the statute of March 1, 1871, under which appellant claims, and that the county commissioners never did nor could they have ordered the tax suits in accordance with such statute. Consequently the statute of 1871, making the county liable for costs in tax suits, can not apply to the cases mentioned in the complaint. The statute

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must be construed as a whole and can only apply in cases where all the provisions and checks of said statute can take effect. Stats. 1871, 93, Secs. 1 and 2; *Oakland v. Whipple*, Cal. July Term, 1872; *Roony v. Buckland*, 4 Nev. 56; *Maynard v. Johnson*, 2 Nev. 27. The statute refers to cases where counties purchase under its provisions and not to purchases made by the treasurer in trust for the State, county and officers under the statute of 1866.

By the Court, BELKNAP, J.:

Under authority conferred by the twenty-ninth section of the "act to provide revenue for the support of the government of the State of Nevada," approved March 9, 1865, the district attorney of the County of Elko, on the 30th day of December, 1870, commenced actions in the name of the State of Nevada for the recovery of delinquent taxes assessed against certain real estate and improvements situate in said county, and against the owners thereof. Thereafter judgments were entered against the defendants and executions issued, and on the sixth day of April succeeding the real estate was subjected to sale in the manner provided by statute for the sale of property for delinquent taxes (Stats. 1866, 161), and was bought in by the county treasurer in trust for the State and county. So the district court finds; and by that finding we are bound, as this case is presented.

The appellant, the sheriff of Elko County during the period embraced by these transactions, brought suit in the court below for the recovery of his fees in these tax suits and sales, amounting to \$6998 40. From a judgment for defendant and an order denying a motion for a new trial this appeal is taken.

The act of 1865 in its original form and as it stood at the commencement of these suits authorized and directed the district attorney to commence them, and provided that "no fees or costs should be paid to any officer unless the same

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be collected from the defendant." This act was amended March 1, 1871. The amended section re-enacts the direction to district attorneys to bring suits for delinquent taxes, but provides that "before commencing any suit for the collection of delinquent taxes the district attorney shall submit to the board of county commissioners, at a meeting of said board to be held for that purpose on the second Monday in December in each year, the delinquent list showing the several amounts of taxes then delinquent, and from whom due; and said board of commissioners shall then, or at such time thereafter as they may deem proper, direct suits to be commenced for the collection of such sums then delinquent as they may in their judgment deem expedient; and no suit for the collection of delinquent taxes shall be commenced except by the direction of said board; * * * * *

* * * * *

And the act was further amended by providing that when property sold for taxes is purchased by the county, all fees and costs properly charged or taxed against such property shall be allowed by the board of county commissioners and paid out of the general fund of the county.

The amendment of 1871 obviously contemplates the payment of fees out of the county treasury in cases only in which suits are brought by direction of the commissioners. The language employed completely demonstrates that object, and it is a fundamental maxim in the interpretation of statutes that when the object of the legislature is plain and the language unequivocal effect should be given to the intent of the law-makers. We are clearly of opinion that the amendment did not contemplate such a case as this, in which the tax suits were commenced without the authority of the county commissioners.

But disregarding the requirements that these suits be brought with the sanction of the commissioners the plaintiff can not recover. It is a rule of statutory construction that new statutes apply to new cases unless the contrary expressly appears: therefore we must presume that had the legislature

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intended to have given a retroactive effect to the amendment, that intention would have been unmistakably expressed. Upon this principle the case of *Gilmore v. Shuter*, 2 Lev. 227, was decided. The statute of frauds (29 Car. II) provided "that after the 24th of June, 1677, no action shall be brought upon any promise in consideration of marriage without a writing testifying the same;" and an action was brought upon a verbal promise made before that date. It was held that the action lay and that the statute extended only to promises made after the 24th of June. In *Moon v. Durden*, 2 Exch. 22, under a statute which declared "that no suit shall be brought or *maintained* in any court of law or equity for recovering any sum of money or valuable thing *alleged* to be won upon a wager," the court held that the statute should not be so construed as to defeat an action brought before its passage.

In these cases the inquiry of the courts was only to the intention of the legislature. Being enactments of the British parliament in the exercise of its unlimited authority no judicial question of their validity could arise.

This rule of construction has been constantly followed by the courts of this country. Said Monell, J., in *Trist v. Cabanas*, 18 Abbott's Pr. R. 145: "When the statute is silent it must be presumed that it was the intention to limit its operation to the period of time when it took effect, and to fasten its provisions only upon such proceedings as might be commenced thereafter." See also, *Dash v. Van Kleeck*, 7 Johns. 479; *Hastings v. Lane*, 3 Shep. 134; *Garrett v. Wiggins*, 1 Scam. 335; *Perkins v. Perkins*, 1 Conn. 558; *Prince v. United States*, 2 Gall. 204. The injustice of a retroactive construction of this amendment is illustrated by the fact that proceedings for the sale of real estate for delinquent taxes for the fiscal year 1870 might have been and in some cases possibly were concluded before the amendment became a law. No provision in such case is made to pay the officer's fees out of the general fund of the county. So unfair a discrimination can not be attributed to the legislature.

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Whether this enactment be considered by the rule that statutes are to operate *in futuro* unless the contrary plainly appears, or that the intent of the legislature when fairly manifested must govern—in either case the right of the plaintiff to recover must be denied.

Judgment affirmed.

THE STATE OF NEVADA, EX REL. W. M. BOARDMAN,
RESPONDENT, v. MYRON C. LAKE, APPELLANT.

EXPIRATION OF FRANCHISE—REVERTER TO THE SOVEREIGN. At the expiration of a toll-road franchise, the control of such road reverts to the sovereign; and in the absence of other special disposition, the free use of such road would be thereafter in the people.

TOLL-ROAD WITH EXPIRING FRANCHISE NOT TO BE LOCATED AS NEW ROAD. Sections 1 and 2 of the act to provide for the constructing and maintaining toll-roads (Stats. 1864-5, 254) apply only to new roads, and give no right to the owner of an old road, whose franchise is about expiring, to locate it as a new road.

ADMISSIO UNIUS EXCLUSIO ALTERIUS. The provision of the act of March 8, 1865, in reference to the construction of toll-roads that "all franchises granted for toll-roads by the first legislature of this State may be located under the provisions of this act" (Stats. 1864-5, 254, Sec. 9), excludes the location thereunder of franchises granted by any other legislature.

TOLL-ROAD A "ROAD IN GENERAL USE BY TRAVELING PUBLIC." The phrase "road or highway now in general use by the traveling public," as employed in the toll-road act of 1865 prohibiting interference therewith (Stats. 1864-5, 254, Sec. 12), includes toll roads—there being no difference in the sense of the statute between such roads and common highways.

EXPIRED BRIDGE FRANCHISE—RIGHTS OF FRANCHISEE AS LAND-OWNER. The fact that the holder of an expired toll-road and bridge franchise has acquired the fee of the land on which the ends of the bridge rest and both sides thereof, does not give him any rights to a continuance of the franchise—the possession by the public of the easement of traveling the road being in no sense antagonistic to his possession of the title to the land.

STATUTORY CONTRACT OF DEDICATION BY ACCEPTANCE OF FRANCHISE. The act of December 17, 1862, granting a toll-road franchise to Myron Lake (Stats. 1862, 19) and Lake's acceptance thereof, amounted to a solemn dedication by him, by way of statutory contract, of claims to any greater easement.

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NO "UTAH TERRITORY JUDGE" IN NEVADA TERRITORY. Where it was claimed that a person assuming to act as probate judge of Carson County, Utah Territory, had granted a perpetuity of franchise in a toll-bridge in Nevada Territory: *Held*, that even if such claim of monstrous power were admitted, yet the pretended grant was void, because there was no Carson County, Utah Territory, after the erection of Nevada Territory; and there consequently could not have been any probate judge, even *de facto*, of such county.

"OFFICER DE FACTO"—REQUISITES. To constitute an officer *de facto* there must be an office, with a place for its exercise and an incumbent under claim of right.

MERGER OF CLAIMS TO EASEMENT BY ACCEPTANCE OF FRANCHISE. Where Lake, claiming to own a perpetuity of franchise to collect toll on the Fuller bridge over the Truckee River, accepted the new toll-road franchise for ten years granted by act of December 17, 1862 (Stats. 1862, 19): *Held*, that whatever rights he may have previously held were merged in the statutory contract contained in that act by his assent thereto.

TOLL-BRIDGE OVER NAVIGABLE RIVER MUST BE AUTHORIZED BY LEGISLATURE.

A bridge over a navigable stream, such as the Fuller bridge over the Truckee River, can only be lawfully built or used for taking tolls by authority of the legislature.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The toll-road franchise, which was the subject of this action and in which the judgment of ouster was rendered in the court below, was granted to Myron Lake by act of December 17, 1862 (Stats. 1862, 19). It gave him the right to construct and maintain the road from the Junction House in Washoe County, running thence northerly and crossing the Truckee River at Fuller's bridge to the mouth of a ravine coming down from Pea Vine Mountain; thence following up said ravine to the base of said mountain, and thence in a north-westerly direction to the boundary line between Washoe and Lake Counties, and to collect tolls thereon for ten years. The same act and Lake's rights under it were under discussion before this Court in the case of *Lake v. The Virginia and Truckee Railroad Company*, 7 Nev. 294.

From the agreed statement of facts upon which the case was tried, it appeared among other things that "on March 7, 1861, under and by virtue of the laws of Utah Territory Fuller obtained and had a franchise and grant to build and maintain said bridge and charge and take tolls thereon, which franchise was without limit as to time, under which franchise

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and grant said Fuller constructed said bridge"; that Lake purchased the franchise and grant and bridge from Fuller in June, 1861, and has since then maintained it "for the accommodation of the public and as a toll-bridge;" that "what was first erected into the Territory of Nevada on March 2, 1861, and now forms part of the State of Nevada, embraced all of what was formerly Carson County, Utah Territory; and that said grant to Fuller was situated in and to be exercised within said Carson County, Utah Territory." This proceeding was instituted by Mr. Boardman as district attorney of Washoe County.

Other facts are stated in the opinion.

Haydon & Cain, for Appellant.

I. The Fuller franchise was granted by the county court of Carson County, Utah. It did not, in granting the franchise to Fuller, exceed its jurisdiction. Its officers, although not officers *de jure* were certainly officers *de facto*, and not usurpers without right or color of right to act; and their acts are valid as far as public rights are concerned. *People v. Cook*, 14 Barb. 259; 4 Selden, 67; *People v. Collins*, 7 Johns. 549; 9 Johns. 135; *People v. Covert*, 1 Hill, 674; *Weeks v. Ellis*, 2 Barb. 320; *State v. Rhoades*, 6 Nev. 364.

II. Lake is not bound by the provisions of the act of March 8, 1865, as he claims by a charter granted to him in 1862 by the Territory of Nevada; and to add burdens and conditions upon him that are not contained in the charter of 1862 would be impairing the obligations of his contract; for had he been informed in his charter that his bridge should at the expiration of ten years become the property of Washoe County he would in all probability not have accepted the franchise. Coolidge Const. Lim. 279, and cases cited; *Dartmouth College v. Woodward*, 4 Wheat. 519; *Mills v. Williams*, 11 Ired. 561.

III. It is claimed that Lake cannot locate his road under the act of 1865, because it is a public road. We deny that it is a public road. It is a road the public may travel by

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paying toll, but not otherwise. Any person who can procure from the landholder the right of way may construct and maintain a road. It is only in respect to the right to collect toll on his road when constructed, that he must make application to the legislature for a franchise. *Bartram v. Central Turnpike Co.*, 125 Cal. 290. The proviso in the statute, that after so many years the county may buy the road, excludes every other manner in which the county can acquire it.

IV. By the best authorities it is held that upon the expiration of the franchise the property constitutes a trust fund for the payment of creditors and stockholders and does not revert to the grantor of the franchise. *Angell & Ames on Corporations*, Secs. 779 and 780. If anybody can construct a road and then apply for a franchise to collect toll, why cannot Lake, as he has done? It is in the power of the county commissioners to regulate his tolls. Stats. 1864-5, 254, Sec. 8.

Ellis & King, for Respondent.

I. The franchise granted to Lake by act of December 17, 1862, expired on December 17, 1872. What became of the toll-road, including the bridge over the Truckee and all bridges and culverts along the line of the road, after the expiration of the time for which Lake might exact tolls? It reverted to the sovereignty. This upon principle. But under our law (Stats. 1864-5, 254, Sec. 7) the ownership, with all the "rights and privileges," vested in the County of Washoe and was subject to the disposition of the county commissioners of that county; and they have not extended the time within which defendant may exact tolls.

II. Lake could not re-locate the same road, for traveling over which he has for ten years enjoyed the franchise of taking tolls, because it was a public highway, or road "in general use by the traveling public." No such road or highway can be located under the provisions of that act. See Sec. 12; *State ex rel. Buckley v. Curry*, 6 Nev. 75. It was a

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public highway; an indictment would lie for obstructing it; a nuisance might be abated upon it; and parties punished for obstructing it. *Commonwealth v. Wilkinson*, 16 Pick. 175; Angell on Highways, Secs. 38-40.

III. Lake's location one day before the expiration of his franchise can make no difference; because at that time certainly the road he was trying to locate was with his own consent a public highway and he was taking toll upon it and had been for ten years. If his location is to be tolerated and upheld, there is nothing in the law to prevent the perpetuation of these franchises by the mere act of the parties in interest—thus making them monopolies in the odious sense of the term, and indirectly violating the constitution of the State. Const. Art. XV, Sec. 4.

IV. Admitting for the sake of argument that Lake has acquired the fee to some of the lands over which the road passes, and to the land upon either side of the stream upon which the bridge rests, still he has *dedicated* a right of way to the public; and he cannot deny that it is a highway. He cannot deny that he has made it a highway or road in general use by the traveling public so far as in his power he could. *Cincinnati v. Lessees of White*, 6 Peters, 435; 3 Kent, 589; Angell on Highways, Secs. 132, 142, 143, 144; *Daniels v. People*, 21 Ill. 439; *Hobbs v. Lowell*, 19 Pick. 405.

V. The Truckee River is a navigable stream. Ownership of the soil can give no private property in a bridge over a navigable stream, nor yet the right to take toll. *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.

VI. The alleged Fuller franchise cannot protect defendant; because at the time of the alleged grant by the county judge to Fuller there was no Carson County, Utah Territory. The Territory of Nevada had been erected out of Carson County, Utah, by the Congress of the United States, March 2, 1861; and the alleged grant of franchise was upon March 9, 1861. There was, consequently, no judge of Carson County, Utah Territory, on March 9, 1861.

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By the Court, WHITMAN, C. J.:

This appeal is from a judgment of ouster touching a certain franchise claimed by the State to have lapsed. Lake, the appellant, in 1862 was authorized by the Territory of Nevada, through its legislature, to take toll for ten years on a certain road, which he was to construct according to the terms of the statute for that case made and provided. An important constituent part of that road was a bridge, known as Fuller's bridge, which Lake then held under purchase from Fuller, which was and is the point for toll collection for passage over or along the road. Stats. 1862, 19.

That the legislature had the power to grant this franchise is not disputed; it is a necessary adjunct of the confessed duty of the legislatures of states and territories, by themselves or others, as a matter of necessity to the public to construct roads and highways. *Lake v. Virginia and Truckee R. R. Co.*, 7 Nev. 294. The road was entirely built on the public lands of the United States; and it is unnecessary here to examine the question whether or no there is any difference between the position of the federal government in this regard and that of any private landed proprietor, as the government has by direct legislation assented to and granted a general easement. "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." U. S. Stat. 26 July, 1866; Brightley, 404, Sec. 104.

The case then stood in 1862 thus: Lake agreed with the territory to build and keep in good repair a road, of which the bridge mentioned was a principal component part; and the territory gave him the right to take toll for passage over and along that road for the term of ten years. As a natural and legal conclusion, it would seem that at the expiration of such term the control of the road would revert to the sovereign which originally gave the right to a private party to construct it for the public use, which was an exercise of power inherent in and belonging only to the sovereign; and that no special disposition being made, the free use of such

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road would be in the people thereafter. Acting evidently upon this supposition, too clear for argument, the legislature of the State of Nevada, successor in power to that of the territory, passed in 1864-5 an act which covers this case, in which among other things it is provided, "Upon the expiration or forfeiture of any toll-road franchise, the ownership with all the rights and privileges shall vest in the county or counties in which it is located; and the county commissioners may declare it a free highway, or they may collect tolls on such roads to keep them in good repair; provided, the county commissioners may extend the time of any expired franchises, so as to allow the owners thereof to collect tolls thereon for five years, subject to all provisions of this act." Stats. 1864-5, 256, Sec 7.

There has been no extension of time and the County of Washoe desires to take possession of this road; but appellant not recognizing the section quoted as applicable to his case, claims under sections one and two of the act referred to, to have on the sixteenth day of December, 1872, the day before the expiration of his franchise, located a new toll-road. Those sections are as follows:

"Sec. 1. Any person or persons desiring to construct and maintain a tol-lroad within one or more of the counties of this State, shall make, sign and acknowledge before some officer entitled to take acknowledgment of deeds, a certificate specifying—first, the name by which the same shall be known; and, second, the names of the places which shall constitute the termini of said road. Such certificate shall be accompanied with a plat of the route of the proposed road, and shall be recorded in the office of the county recorder of the county or counties within or through which such road is proposed to be located, and the record of such certificate and plat shall give constructive notice to all persons of the matters therein contained. The work of constructing such road shall be commenced within thirty days of the time of making the certificate above mentioned, and shall be continued with all reasonable dispatch until completed.

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"Sec. 2. On complying with the provisions of the preceding section, said person or persons shall have the right to construct, complete and maintain a toll-road over the route and between the termini mentioned in such certificate, and establish and collect such rates of toll thereon as he or they may deem proper for the term of ten years * * * * *."

There is no question but that the formalities of the act have been complied with by appellant, and that he has located his claim for a toll-road upon the exact site of the one built by him under the act of 1862. Passing the inevitable inference from the language cited; that new roads and only new roads were contemplated by the legislature, section 12 of the act uses these express words: "Sec 12. No toll-road, constructed under the provisions of this act nor otherwise, shall interfere with any road or highway now in general use by the traveling public or the emigration from the east." And if this be not sufficient, section 9 speaks thus: "Sec. 9. All franchises granted for toll-roads by the first legislature of this State may be located under the provisions of this act."

Upon the maxim *admissio unius, exclusio alterius*, the act which admits the location of toll-road franchises granted "by the first legislature of this State," excludes the location of any other; and it is not claimed that this is such franchise. It is said, however, notwithstanding this apparent clearness, that the right existed in Lake to locate a toll-road on the site of the old road, because that was not a "road or highway now in general use by the traveling public," for the sole reason that it was a toll-road. Such is not the law. "The only difference between this and a common highway is, that instead of being made at the public expense in the first instance it is authorized and laid out by public authority and made at the expense of individuals in the first instance, and the cost of construction and maintenance is reimbursed by a toll levied by public authority for the purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other public highway."

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Commonwealth v. Wilkinson, 16 Pick. 175; Angell on Highways, Secs. 38-40; *State ex rel. Buckley v. Curry*, 6 Nev. 75.

Further objecting to surrender, appellant shows that since the date of the grant of 1862 he has acquired title in fee to the land on which the ends of the bridge rest and on both sides thereof, and also to a portion of the land on which the road is located. Precisely when this title was obtained does not appear, nor does it matter, as it is not necessary to resort to the principle of prescription in this case. Appellant's title can avail nothing in this contest; his possession of such title, and the possession by the public of the easement of traveling the road, are in no sense antagonistic. The public does not claim the fee, and it rests intact in Lake, subject only to the easement named.

This easement could have been raised in various ways, which need not here be specified, but was actually here fixed by the solemn dedication of appellant. No court has ever in its utmost strictness called for more conclusive evidence of dedication than is presented by the statutory contract of 1862 and the acts of appellant thereunder, making it absolute, fixed and executed. *Lade v. Shepherd*, 2 Stra. 1004; *Connehan v. Ford*, 9 Wis. 240; *Cincinnati v. Lessees of White*; 6 Peters, 435; *Hobbs v. Lowell*, 19 Pick. 405; *Daniels v. People*, 21 Ill. 439.

On the same principle appellant's claim to a perpetuity of franchise in the right to take toll on the bridge falls. This right it is asserted was granted to Fuller by one assuming to act as probate judge of Carson County, Territory of Utah, after the erection by Congress of the Territory of Nevada, within the boundaries of which was included the ground where this pretended judge was acting. Admitting for the nonce that such an officer had or under any conceivable circumstances could have had such a power, which on its face is monstrous, and that such franchise could stand after the adoption of the State constitution, which provides that "No perpetuities shall be allowed except for eleemosynary purposes" (Const. Art. XVI, Sec. 4.); yet it is evident that his action herein was void as without authority; for

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this is not a case, as argued by counsel for appellant, of the action of an officer *de facto*, good as to third parties. To constitute an officer *de facto* there must be an office, with a place for its exercise, with an incumbent under claim of right. None of these requisites here appear. There was no Carson County, Territory of Utah, at the date of this act, consequently no probate court nor judge thereof for such county. Again, as appellant owned the bridge and whatever rights Fuller had therein at the date of the contract of 1862, he merged all other claims in that contract by his assent thereto and his acts thereunder; and thus, if he had such other perpetual right, it is too late to assert it now.

The bridge has all along been treated simply as part and parcel of the toll-road; but if the point is insisted upon that this bridge is not such part and parcel, it does not help appellant's claim to the right to take toll thereon. The bridge is over a navigable stream, and consequently could only be lawfully built or used for toll taking by the authorization of the legislature. *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44. No such present authority exists, as has been seen; so the State, even in that view, would have a right to the present action. Turned in any light, the position of appellant is untenable, and the district court properly so held. Its judgment is affirmed.

MYRON C. LAKE, RESPONDENT, v. JAMES S. TOLLES,
APPELLANT.

EQUITABLE CHARACTER OF ACTION NOT DESTROYED BY ANSWER DENYING TITLE.

Where a complaint is of an equitable nature, such as in a suit to quiet title to the use of water, the mere fact that the answer raises questions as to the plaintiff's right of property does not destroy the equitable character of the action.

NO STRICT RIGHT TO JURY TRIAL IN EQUITY CASE. Before a jury trial can be claimed as a constitutional right, there must be an action at law, as contradistinguished from a suit in equity and from a special proceeding, or a criminal action and an issue of fact joined therein upon the pleadings.

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NO ERROR TO REFUSE JURY WHERE NO STRICT RIGHT THERETO. Where there is no strict constitutional right to a jury trial, the calling of a jury is purely a matter of discretion with the judge; and his refusal will not constitute error.

MERE POSSESSOR OF PUBLIC LAND HAS NO RIPARIAN RIGHTS. A mere possessor of unsurveyed government land has no riparian rights to the use of a stream of water flowing through it.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The complaint in this action alleged that the plaintiff was the owner in fee and in possession of certain land in Washoe County, known as "Truckee Meadows;" that he and his grantors had been in possession thereof since 1859, and had been seized in fee thereof since 1864; that a stream of water, known as Evans' Creek, flowed through said land in its natural channel; that in 1859, plaintiff's grantor claimed the use of all the waters of said stream by posting and recording notice of his claim and appropriated all such waters by building dams and digging ditches so as to divert the same from their channel to irrigate his land; that plaintiff and his grantor had been the owners of and entitled to the use of said waters and had enjoyed the exclusive use thereof from 1859 and until the defendant went into the occupation of a tract of land on Evans' Creek but higher up than that of plaintiff; that after defendant's going into possession of his land he was at his special request permitted by plaintiff's grantor to use a portion of the waters of said creek to irrigate his land until 1870, when plaintiff, having then become the owner of his land, forbade defendant from using any of said waters unless he would take a lease from plaintiff and pay a reasonable rent therefor; that defendant failed, neglected and refused to enter into such lease or pay any rent or acknowledge plaintiff's absolute rights to the use of all said waters, but by specious promises to do so prevented plaintiff from prosecuting his suit to settle and determine his right thereto; that in the meantime defendant had unlawfully and for two years deprived plaintiff of thirty inches of water of said creek estimated under four inches pressure, worth at plaintiff's land to which it would otherwise

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have flown \$4 per inch, to the damage of plaintiff \$240; and that defendant had also renounced using such water under the license of plaintiff's grantor and claimed to have used and claimed and to use and claim the same in his own right and adversely to all the world. There was a prayer that the title to the use of the waters should be settled and adjudged to belong to plaintiff; that plaintiff have judgment against defendant for \$240 damages for withholding the use of said water; that defendant should be enjoined from using or interfering with any of the waters of said creek; and for general relief and costs.

The defendant interposed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled; and defendant then put in an answer, denying most of the allegations of the complaint and the right of plaintiff or his grantor to the waters of said creek, and setting up right and title in himself to the waters used by him and the exclusive enjoyment thereof in his own right for more than five years before the commencement of this suit, and ever since 1863.

The cause came on for trial in the court below at the January term, 1872. At the calling of the calendar on the opening of that term, defendant appeared in person and demanded a jury trial. The court replied that upon demand made by his attorneys for a jury, the cause would be set for jury trial. Nothing further appears to have been done till the day on which the case was regularly reached, when defendant and his counsel appeared and demanded a jury trial. The application was denied and the trial ordered to proceed before the court without a jury.

There were findings in favor of plaintiff and upon them there was entered a decree as prayed in the complaint, with the exception that the question of damages appears to have been passed without notice and only nominal damages in the sum of one cent awarded to plaintiff. There was also a perpetual injunction against the defendant and all persons claiming or acting under him from taking or diverting any of the waters of Evans' Creek from its natural channel. De-

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fendant moved for a new trial, which being denied, he appealed from the judgment and order.

Mitchell & Stone, for Appellant.

I. If the case was one at law the court had no jurisdiction, for the reason that the damages claimed did not exceed the sum of \$300. If it was one in equity the demurrer should have been sustained, for the reason that the complaint did not allege sufficient facts. The injury complained of was past; none was being committed or threatened at the time of filing of complaint.

II. The suit is not purely an action in equity although an injunction is prayed for; and the answer of defendant presenting a legal defense only, entitled him as a matter of right to a trial by jury. The refusal of the court below to allow a jury trial was therefore erroneous and a new trial should have been granted. *Bodley v. Ferguson*, 30 Cal. 518; *Van Vleet v. Olin*, 4 Nev. 98; 9 N. H. 340; 1 Story Equity, Sec. 72; 18 N. H. 389; Const. of Nev. Art. I, Sec. 3; Art. VI, Sec. 14; Practice Act, Secs. 156, 157.

III. The judgment and perpetual injunction granted in this case deprives defendant wholly of the use of any of the water of Evans' Creek for any purpose. He is prohibited from not only using the water for irrigating purposes, but is restrained from taking it for reasonable family use and for the stock or cattle on his ranch. An injunction so sweeping in its terms should not be sustained; and the defect appearing in the judgment roll and judgment, it should be reversed. *Union Mill and Mining Co. v. Albert Ferris et al.*, U. S. C. C. Dist. of Nev.; *Vansickle v. Haines*, 7 Nev. 286.

IV. Defendant was in possession of and using the water in controversy adversely to plaintiff and his grantors for more than five years prior to the commencement of the action, and for more than five years subsequent to the issuance to plaintiff's grantors of U. S. patents. It was therefore error to find that defendant held and used the water in subordination to the title of plaintiff and his grantors.

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Vansickle v. Haines, 7 Nev. 283; *Davis v. Gale*, 35 Cal. 35; 25 Cal. 508.

Ellis & King and *Haydon & Cain*, for Respondent.

I. There was no error in overruling the demurrer, because it was a general demurrer to the entire complaint and ought to have been overruled if any one of the counts were good. *People v. Morrill*, 26 Cal. 361; 4 Cal. 327, 448; 10 Cal. 233; 26 Cal. 294. And here the complaint undoubtedly contained one good cause of action; that is to say, the count for damages.

II. But the complaint alleged sufficient facts to be a good bill in equity. Plaintiff asked to have his title quieted as was authorized by section 256 of the Practice Act. A plaintiff has a right to be quieted in his title to real estate of which he is in possession, whenever any claim is made the effect of which might be litigation or loss to him of the property. *Head v. Fordyce*, 17 Cal. 151; *Curtis v. Sutter*, 15 Cal. 259; *Merced M. Co. v. Fremont*, 7 Cal. 319.

III. Being an equity case it was a proper one for trial by the court without a jury. If there were any questions of fact involved the court might have directed an issue to be framed and a submission to a jury; but the calling of a jury in such a case is purely a matter of discretion with the judge and not a matter of right in the parties. *Van Fleet v. Olin*, 4 Nev. 98.

IV. It is said that the complaint fails to show that defendant threatens to continue claiming and diverting said water; but the answer sets up the right to continue using the same; and hence a court of equity upon the pleadings will interfere effectually to protect the plaintiff. *Angell on Water Courses*, §444. If the diversion of water may become by lapse of time the foundation of an adverse right in defendant, there is no more fit case for the interference of equity by way of injunction to restrain defendant from such injurious act. *Angell on Water Courses*, §449.

V. There are no facts imperatively calling upon the chancellor to submit to a jury. Plaintiff since 1865 claims

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by a U. S. patent. Defendant claims his land by bare possession; hence he is not a riparian owner and is in no condition to dispute plaintiff's right to the water. *Vansickle v. Haines*, 7 Nev. 286. There are no questions in regard to damages, for no evidence was introduced on that subject.

By the Court, WHITMAN, C. J.:

jury
Appellant contends that he should have been allowed a jury trial, and claims the refusal as error. The complaint was purely equitable and sufficient probably in any view but certainly unless specially demurred to, save so far as it showed and prayed damage; but this claim was merely incidental to the main issues and was in reality abandoned, as no proof was offered thereon nor any judgment taken therefor.

That the answer raised certain questions as to the rights of property did not, under the constitution of this State or that of the United States, destroy the equitable character of the action. As was said by the supreme court of California on the point of the constitutional inviolability of jury trial: "It is a right secured to all, and inviolable forever, in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several states of the union. It is a right therefore which can only be claimed in actions at law or criminal actions where an issue of fact is made by the pleadings. It cannot be claimed in equity cases, unless such issue be specially framed for a jury under the direction of the court. It cannot be asserted upon an issue at law, for that is a matter purely for the court. The fact, therefore, that property and rights of property may be involved in the disposition of a particular case or proceeding, does not determine the right to a trial by jury. There must be an action at law, as contradistinguished from a suit in equity and from a special proceeding, or a criminal action and an issue of fact joined therein upon the pleadings, before a jury trial can be claimed as a constitutional right." *Koppikus v. State Capitol Commissioners*, 16 Cal. 249.

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Where there is no strict constitutional right the calling a jury "is purely a matter of discretion with the judge, and not a matter of right in the parties." *Van Vleet v. Olin*, 4 Nev. 95. Such was this case, and consequently there was no error in the refusal of a jury trial.

The cases cited from New Hampshire do not in the least militate against this position, as they go upon a peculiar constitutional provision. Const. N. H. Sec. 20.

The decree does not conflict with any riparian rights of appellant, as the evidence without dispute shows that he had none, being merely a possessor of unsurveyed government land. *Lobdell v. Simpson*, 2 Nev. 274; *Covington v. Becker*, 5 Nev. 281.

Any other rights he may have had were determined by the district court, upon evidence in some sort conflicting but preponderating in favor of respondent; so such conclusion cannot properly be disturbed.

The order and decree appealed from are affirmed.

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM
H. PIERCE, APPELLANT.

CLOSING ARGUMENT IN CAPITAL CASES. Where the defendant in a capital trial was not allowed to close the argument to the jury; but it appeared that two counsel on each side argued the case and that they alternated, the prosecution having the close: *Held*, no error.

SUPERFLUOUS MATTER IN INDICTMENT. An indictment is not insufficient on account of containing more than the statute demands, if there be nothing in it to perplex a person of ordinary understanding or injure the defendant.

POSTPONEMENT OF SENTENCE IN CASE OF ESCAPE—SENTENCE AT SUBSEQUENT TERM. Where a defendant after conviction of murder in the second degree escaped and could not be produced on the day fixed for sentence, and sentence was thereupon postponed until such time as he could be produced; and being produced at a subsequent term he objected that at the expiration of the former term the court lost all jurisdiction of the cause and could not afterwards render any judgment: *Held*, that the objection was frivolous.

TIME FOR SENTENCE. The statutory requirement that a day be fixed for sentence is for the benefit of the convicted person; and if he by escape deprives himself thereof, he cannot complain of being sentenced at any day of any term of court thereafter.

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INSTRUCTION MUST APPLY TO CASE MADE BY EVIDENCE. Though an instruction asked by defendant in a criminal case and refused be good law, yet, if on appeal no evidence be carried up, the presumption will obtain that there was no evidence on which to base it and that its refusal was correct.

RIGHT OF COURT TO GIVE INSTRUCTIONS IN CRIMINAL CASES ON ITS OWN MOTION. That a court has a right to give instructions to the jury in a criminal case of its own motion, there can be no possible question.

PROOF BEYOND REASONABLE DOUBT NOT REQUIRED TO ESTABLISH MITIGATORY CIRCUMSTANCES. Where in a murder case the court instructed to the effect that if the jury found beyond a reasonable doubt that deceased inflicted upon defendant a serious and highly provoking injury, sufficient to excite an irresistible passion in a reasonable person, and that defendant, without any interval sufficient for the voice of reason and humanity to be heard, slew deceased, they should convict of manslaughter: *Held*, palpably and flagrantly erroneous.

DISTINCTION IN DEGREES OF EVIDENCE REQUIRED IN PROOF OF GUILT OR IN MITIGATION. In criminal cases, evidence tending to prove guilt must be established beyond a reasonable doubt; that tending to mitigate or disprove, by a preponderance of testimony.

AMENDMENT, AFTER FILING, OF BILL OF EXCEPTIONS IN CRIMINAL CASE. Where upon sentence for murder at a term subsequent to that of conviction and after the time for settling and filing a bill of exceptions had expired, defendant was allowed to amend his bill: *Held*, that the court had an unquestionable right to allow such amendment.

SPIRIT OF CRIMINAL LAW—RIGHTS OF ACCUSED PERSONS. No technicality, except by the express letter of the law, should ever deprive an accused person of a substantial right.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The defendant was indicted by the grand jury of Ormsby County at the November term, 1872, of the murder of George Wilson, alleged to have been committed on September 13, 1872. The indictment charged that defendant on that day or thereabouts "without authority of law and with malice aforethought did shoot George Wilson at Carson City in the County of Ormsby, State of Nevada, with a six shooting Colt's navy pistol, which he the said defendant William H. Pierce in his right hand then and there had and held, which said pistol was then and there loaded with powder, caps and leaden balls, and did then and there unlawfully and with malice aforethought wound him, the said George Wilson, in and upon the breast and body of him, the said

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George Wilson, whereof he the said George Wilson died at Carson City in the County of Ormsby, State of Nevada, on the said thirteenth day of September, A. D. 1872; and by thus unlawfully, feloniously and with malice aforethought shooting him the said George Wilson with a pistol as aforesaid at Carson City, Ormsby County, State of Nevada, on said thirteenth day of September, A. D. 1872, he, the said William H. Pierce, did wilfully, unlawfully, feloniously and with malice aforethought kill and murder him, the said George Wilson, a felony contrary to the form of the statute," etc.

Defendant demurred to the indictment on the ground that it did not conform to the requirements of section 234 of the Criminal Practice Act, nor set forth the offense charged in ordinary and concise language so as to enable a person of ordinary understanding to know what was intended. The demurrer was overruled; and defendant then pleaded not guilty.

The cause having been transferred for trial to Douglas County, came up on December 11, 1872, and was opened by Wm. Patterson, District Attorney, for the State, followed by Mr. Clayton for defense. At the close of the testimony defendant's counsel moved that the defense should have the closing argument, which motion was denied. Mr. Patterson then commenced summing up for the State, and was followed by Mr. Davies for defense; then Mr. Patterson replied for the State; followed by Mr. Clayton for defense; and the argument was closed by Mr. Ellis for the State.

Other facts will be found stated in the opinion; and it may also be stated here that the following points, made by counsel in their written briefs, embrace only a portion of those urged by them on the oral argument. Several of the points, not included in the briefs, are noticed and ruled upon in the opinion.

The defendant was sentenced to imprisonment in the State prison for the term of thirty years. This appeal was from the judgment and orders overruling defendant's motion in arrest of judgment and for new trial.

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Robt. M. Clarke, for Appellant.

The court erred to the prejudice of defendant in giving the instruction requiring proof beyond a reasonable doubt of provocation by deceased to reduce the offense to manslaughter. The instruction was erroneous for two reasons. First, it excluded the defense of "justifiable homicide," (which defense was included in and asserted by the plea of not guilty,) and in effect told the jury that they must convict the defendant of manslaughter at least. *Davis v. Georgia*, 10 Geo. 106. The killing in "manner as charged in the indictment" was a killing in the "method" charged, that is by shooting with a pistol; this might have been done in self-defense, in which case it would have been "justifiable homicide." Second, the instruction not only put the burden of proving circumstances of mitigation upon the defendant, but required him to establish such circumstances of mitigation "beyond any reasonable doubt." It was in law only required of defendant to establish the circumstances of mitigation by a preponderance of proof. Stats. 1861, 61, Sec. 33; 1 Bishop's Crim. Pr., Sec. 105; *People v. Arnold*, 15 Cal. 482; 24 Cal. 236; 43 Mo. 127; 43 N. H. 224; 19 Ind. 170.

L. A. Buckner, Attorney General, for Respondent.

I. The verdict was rendered and recorded on December 12, 1872; on December 16 defendant escaped from jail; upon which fact being made known to the court by the sheriff, an order was entered postponing the rendition of judgment until some day in a future term when the sheriff could produce defendant. On May 5, 1873, defendant was produced; and upon being asked if he had any legal cause to show why judgment and sentence should not now be pronounced against him, he asked leave to amend his bill of exceptions, which had been filed and settled at the previous December term. The district attorney objected to the proposed amendment on the ground that the bill of exceptions by our criminal code is required to be filed and settled within ten days after the entry

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of the verdict. The effect of allowing the amendment five months after rendition and entry of the verdict was to make the instructions of the court a part of the record—which was not record or contained in the bill of exceptions previously settled. We claim that the amendment could not be made and that this court will not look into the instructions because they are no part of the judgment roll. *State v. Forsha*, ante 137; *State v. Burns*, ante, 251. It will be noted that this point is not as to the time the court could have settled the bill of exceptions, but that having already settled and filed such bill it had no authority either by the common law or by our statute to amend it. No such attempt has ever been made in this State, nor can any precedent therefor be found in any other state with a code like ours or where the common law is in force.

II. But whether properly a part of the record or not, the instruction criticized as erroneous is not so. It gives correctly the law of murder in the first and second degree and also of voluntary manslaughter; and as the transcript does not contain any of the evidence the presumptions are in favor of the correctness of the action of the court below. *Champion v. Sessions*, 2 Nev. 271; *Lady Bryan G. & S. M. Co. v. Lady Bryan M. Co.*, 4 Nev. 414. The object in asking and in giving the instruction was to inform the jury that if the facts proved constituted manslaughter and not murder, then the verdict should be “guilty of manslaughter.” The instruction complained of was asked by the defendant.

Wm. Patterson, also for Respondent.

I. The indictment was good as containing all the essential facts and averments required by the common law and the statute of this State. Stats. 1867, 126, Sec. 6; *State v. O’Flaherty*, 7 Nev. 155.

II. There was no error in allowing counsel to alternate in the argument of the case before the jury. Stats. 1867, 472, Sec. 357.

III. The defendant could be properly sentenced at the May term, 1873, as he had escaped after trial and before the

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time fixed for sentence and was not captured until after the adjournment of the December term. The time for passing sentence is left to the discretion of the court with the sole restriction that it must not be less than two days after verdict, if the court intends to remain in session that long; but in no case less than six hours after verdict. Stats. 1861, 492, Sec. 436; *People v Felix*, Cal., Oct. term, 1872.

By the Court, WHITMAN, C. J.:

It is objected by the appellant, convicted of murder in the second degree, that he was not allowed to make the final argument to the jury. The statute is as follows: * * * "When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the counsel for the people must open and must conclude the argument." * * * "When the state of the pleadings requires it, or in any other case for good reasons and in the sound discretion of the court, the order prescribed in the last section may be departed from." "If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately." * * * Stats. 1861, 472, Secs. 355, 356, 357. The court may change the order of argument, and in case of the allowance of two counsel must require the argument to alternate. It did not see fit to change the order (and no cause therefor save the request of appellant appears of record) and did so arrange the order of argument that counsel alternated, the prosecution having the close, as the statute peremptorily requires. There was no error in this.

It is again objected that the indictment is insufficient. A careful perusal satisfactorily shows it to be perfectly good, though perhaps through excess of caution containing more than the statute demands; but in this superfluous matter, if so it be, there is nothing to perplex one of ordinary understanding nor to injure this appellant.

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On the day fixed for sentence the prisoner could not be produced, having escaped, whereupon the following order was made: "And it now appearing to the satisfaction of the court that said defendant can not now be produced in court, it is therefore ordered by the court that the sentence and judgment of the court be and it is hereby postponed until such time as the said prisoner can be produced in court at a day of a term of this court." At a subsequent term the appellant, having been recaptured, was brought up for sentence and thus objected: "that upon the expiration of the December (A. D. 1872) term of this court all jurisdiction of this cause was lost, and that the court hath not at this time power to render any judgment herein."

The objection was frivolous and exceeding cool. He could not have been legally sentenced in his absence, which was voluntary; and it would have been a vain thing for the court to have fixed while he was at large any definite time for his sentence other than it did fix; that is, some day when he could be produced at a term of court. The statutory requirement that a day be fixed for sentence is for the benefit of the convicted person. In this case the appellant had secured the benefit, and then of his own volition deprived himself thereof. If he lost any thing thereby he had nobody but himself to blame, but in fact he did not lose any thing and was clearly liable to recapture and subsequent sentence at any day of any term thereafter. Any other conclusion would render the administration of the criminal law a farce.

It is further objected, that the court refused the following instruction: "If the jury believe from the testimony that the defendant was laboring under an insane delusion, whether such delusion was founded in fact or not, that he was about to receive a great bodily injury from the attack made upon him by deceased, and that under such circumstances the killing took place, then that the killing was justifiable and that they must acquit." Admitting this requested instruction to be good law, there is no evidence reported in the transcript, and consequently nothing upon which this court could say

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the instruction could be based. The presumption is there was no such evidence; and so the ruling of the district court must be held to be correct.

That the court properly may give, as in this instance it did, instructions of its own motion was held in *State v. Burns*, ante, 251: there can be no possible question of its right under the statute. These several assignments of error have been specifically overruled, as the case must go back for a new trial upon another point, and it is well to clear the way therefor.

After giving the statutory definitions of homicide in all its various branches, the court gave the following instructions (which have been numbered for convenience of reference): "No. 1. The above, gentlemen, is the law of homicide as applicable to this case, and is found in the book of statutes as enacted by the first legislature of this territory in A. D. 1861. 2. A careful examination and study of those several provisions of the statute law will doubtless give you great assistance in arriving at a correct conclusion in your solemn deliberations. 3. This defendant, William H. Pierce, was indicted in November last by the grand jury of the County of Ormsby for the alleged murder of one George Wilson. The cause after due proceedings had in the district court for Ormsby County was transferred to this the County of Douglas for trial. 4. You, gentlemen, are now trying and are expected in due time to render your verdict upon the issues of law and fact raised by this indictment and the plea of "not guilty," which was entered thereto by the prisoner at the bar. 5. The law presumes every accused person to be innocent until his guilt has been fully proved by legal testimony beyond any reasonable doubt. 6. You as jurors are alone the judges of all questions of fact. You are carefully to weigh the testimony which has been allowed before you by the several witnesses and harmonize the same if practicable with some intelligent theory as to the facts involved in this trial. Upon no mere question of fact can the judge offer you any assistance or advice. You will therefore see what are the responsibilities resting upon sworn jurors in

the trial of criminal cases. 7. To juries the community looks for the upholding of the criminal law where any serious infraction of that law may have occurred, and to those same juries are all accused persons as well to look for the benefit (of) each reasonable doubt upon the question of guilt or innocence. 8. No motive of favor or vengeance should actuate any juror in the rendition of his verdict. He should dispassionately render his verdict, whatever it may be, without passion or prejudice. 9. If you the jury believe from the testimony beyond any reasonable doubt that at the County of Ormsby and State of Nevada, on or about the 13th day of September last and before the finding of this indictment, the defendant William H. Pierce with malice aforethought feloniously, wilfully and unlawfully, with a six shooting revolving pistol in his hand, then and there held, did then and there shoot and kill the said George Wilson, as charged in this indictment, your verdict will be that this defendant is guilty of murder of the first degree, as charged in this indictment. 10. If you so find the defendant guilty of murder, you will designate in your verdict whether it be murder of the first or of the second degree. 11. If you believe from the testimony beyond any reasonable doubt that at the time and place above named, the said George Wilson inflicted upon the person of this defendant a serious and highly provoking injury, sufficient to excite an irresistible passion in a reasonable person, and that then and there without any interval sufficient for the voice of reason and humanity to be heard, this defendant slew the said George Wilson in manner as charged in the indictment, you will find this defendant guilty of manslaughter. 12. If you find from the testimony that the defendant has not been beyond any reasonable doubt proved guilty of any crime coming within the accusation contained in this indictment, you will find the defendant not guilty. 13. It will be necessary for your entire number, twelve, to agree together before you can render any verdict, whether for conviction or acquittal. 14. Gentlemen, you will now take this cause; enter with due solemnity



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upon your deliberations, and in due time render your verdict."

This charge has been quoted entire that it may of itself, without any very critical exposition in words, illustrate and sustain what will be summarily said thereof in this opinion. In it there is much that is unnecessary and confusing, if not absolutely erroneous: notably, paragraphs two, six, seven and nine balance at best so giddily upon the verge of error that one dreads to look lest they fall therein. Of the whole production it is not improper to suggest that in a case plain and simple as this appears from the record to have been, where probably the only matter pressed for defense was in mitigation of or in exculpation from a confessed and admitted homicide, it is the obvious and easy duty of the court trying such case to make its instructions terse and direct under the well settled rules of law, without indulgence in rhetoric or exhortation.

If this is proper to be said generally of the charge as an entirety, what language shall be used with regard to paragraph eleven? A casual reading produces the conviction, only intensified by careful study, that it is so palpably and flagrantly erroneous that it must have been supposed an inadvertence in the use of language, were it not for the incomprehensible fact that it passed the ordeal of an application for a new trial in the district court and is seriously supported by the prosecution in this. Such being the case, deference thereto requires a glance at the authorities.

Under the indictment here and the statutes of this State, the appellant if convicted could be so of murder in the first degree, murder in the second degree or manslaughter, according to the proofs; and to find either grade of guilt the jury must be satisfied thereof from all the evidence, beyond a reasonable doubt. Such the general rule of law: thus the statute: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted." Stats. 1861, 472, Sec. 358. So the district court substantially charged. On the

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same principle, being guilty of some offense to be found under the indictment, any reasonable doubt as to the grade is to be taken in favor of the accused. Says the statute: "When it legally appears that a defendant has committed a public offense and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only." *Ib.* Sec. 359.

Under the strictest rule, there is this distinction always to be borne in mind between evidence tending to prove guilt and that tending to mitigate or disprove, whether it come from the prosecution or defense: that tending to prove guilt must be established beyond a reasonable doubt; that tending to mitigate or disprove, by a preponderance of testimony. So when the jury considers whether an asserted fact of defense has or has not been proven they must decide whether the evidence *pro* or *con* outweighs; if the former, the fact is proven; if the latter, it is not. If not proven it is out of the case. If proven, it takes its place along with other received proof; and if upon the whole evidence from both sides, as finally settled, there is any reasonable doubt of guilt either in existence or degree, the defendant has the benefit of such doubt, either to acquit, or to reduce the grade of crime. *State v. McCluer*, 5 Nev. 132.

The rule is stated strongly and clearly by the supreme court of California thus: "Proof beyond a reasonable doubt is necessary to establish a fact against the prisoner; but preponderating proof, proof necessary to satisfy a jury of the fact, is sufficient to establish the fact in his favor. But it must go to this extent, otherwise there is nothing on which the jury can found their belief and warrant them in considering the fact proved. It is not sufficient therefore to raise a doubt, even though it be a reasonable doubt, of the fact of extenuation, simply because it is no proof of the fact." *People v. Milgate*, 5 Cal. 127; *People v. Coffman*, 24 Cal. 230.

It has been held in some isolated cases, of which *State v. Spencer*, 1 Zab. N. J. 196, and *Rex v. Offord*, 5 C. & P. 168, are examples, that where insanity is set up as a substantive

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defense, it must be proved beyond a reasonable doubt; but the weight of authority is the other way. *State v. Bartlett*, 43 N. H. 224; *People v. McCann*, 16 N. Y. 58; *Polk v. The State*, 19 Ind. 172; *State v. Klinger*, 43 Mo. 127. This departure is however confined to that special defense and is sought to be maintained upon peculiar grounds, which cannot here be examined. The rule quoted is the strictest exposition of the law; and that must be taken and understood with the qualification that the defendant need offer no proof unless the prosecution has made out a *prima facie* case beyond a reasonable doubt; and to this effect is our statute, in cases of homicide—taking section 358 before cited in connection with section thirty-three of the crimes act. “Sec. 33. The killing being proved, the burden of proving circumstances of mitigation or that justify or excuse the homicide will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide.”

There being no evidence submitted by the transcript, the appellant admits that if under any legitimately conceivable state of circumstances the instruction under review could be correct, it must be sustained. From the record it appears that witnesses were sworn on his behalf; so then it must be presumed that apart from the proof by the prosecution of the *res gestæ*, he endeavored to give evidence in mitigation, to reduce his offense from murder to manslaughter. To make this effective what degree of proof was necessary? A preponderance, says the rule hereinbefore laid down; not that it was necessary for him to establish to the satisfaction of the jury by preponderating proof, that there were circumstances to mitigate, justify or excuse the homicide. That was decided, in *State v. McCluer*, *supra*, to be an erroneous statement of the law, in that the jury would conclude therefrom that the proof on defense must preponderate over the proof made by the prosecution; and it is said in *Commonwealth v. York*, which is considered of the strictest sect in criminal decisions: “But if the case on the evidence should

be *in equilibrio*, the presumption of innocence will turn the scale in favor of the accused." When therefore it is said that defendant must establish circumstances in mitigation or defense by a preponderance of proof, it is meant that the proof should so preponderate as to the existence of the fact desired to be proved, over the evidence against it, that a jury might properly accept it as proven and then, weighing all proof together, give the benefit of any reasonable doubt arising upon the whole to the defendant.

It never was required to go further; and yet the jury in this case was instructed that the circumstances of mitigation must be proven beyond a reasonable doubt. If any other construction could be given to the language of the instruction, "If you believe from the testimony *beyond any reasonable doubt* that at the time and place above named the said George Wilson inflicted upon the person of this defendant a serious and highly provoking injury," etc., it would be the duty of this court to give it, as by the transcript all presumptions are in its favor; but it cannot be forced into any other form unless the words "beyond any reasonable doubt" be excised bodily. It is too late to do that now. The jury heard the charge; if from the whole thereof and from this instruction in particular they formed any idea, it must have been that the degree of proof required from each side, prosecution and defense, was the same; and that all matter offered in evidence by either stood on the same plane and must be proved beyond any reasonable doubt.

View this instruction in any legal light, even were such as multiform as the whirling changes of a kaleidoscope, and it must remain as it was written, wrong—so baldly, indefensibly wrong, that its giving entitled the appellant to a new trial.

It was insisted by respondent that this charge of the district court should not be here examined, as it was not properly part of the record, having only become so by virtue of an amendment made, against respondent's objection, to appellant's bill of exceptions after the statutory time of settling and filing the same had long expired. The transcript shows

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that a bill of exceptions was duly settled and filed in December, 1872; that in May, 1873, when appellant was called for sentence, he asked to amend by inserting in the last clause of his bill the words "the annexed;" so that the sentence would read: "The defendant by his counsel further excepted to the action of the court in giving the annexed instructions to the jury" * * * in lieu of "The defendant by his counsel further excepted to the action of the court in giving instructions to the jury" * * * * Whether any instructions were in fact annexed to the original bill of exceptions does not appear; the presumption is that there were such, and that the amendment was simply to correct a clerical error. But taking the opposite ground and admitting that the effect of the amendment was to bring something here which would not otherwise have come, still that the court had the right to allow the amendment is one of those self-evident propositions which preclude argument.

No technicality except by the express letter of the law should ever deprive an accused person of a substantial right. If, as was suggested on the argument (not in the best taste), such rule confers in this special case a benefit on one unworthy, the answer is, the law knows no person; it is not made for the individual man, but for men. As the dew of heaven falls, so it bears alike upon the just and unjust.

It was perhaps unnecessary to attempt to add anything to the exhaustive reasoning of Chief Justice Lewis in the case of *The State v. McCluer*, *supra*, decisive of this; but it has been attempted, in the hope that a unison of ruling might be produced between this and the *nisi prius* courts, which would prevent the certainty of present delay, perhaps the ultimate failure of justice, hardship to defendants, expense both to them and the counties of trial, and, last and not least, trouble to the courts, for they are "born unto trouble as the sparks fly upward."

The order, denial of motion, and judgment herein appealed from are reversed and the cause remanded for a new trial.

Blasdel v. Kean.

HENRY G. BLASDEL, RESPONDENT, v. SYLVESTER
KEAN *et als.*, APPELLANTS.

SERVICE OF SUMMONS—CONTRADICTION IN RECORD—PRESUMPTIONS. Where on appeal from a judgment by default, the record indicated that the summons had been served after it had been filed, but the judgment recited that the default was entered "upon due proof of the service of summons and copy of complaint as required by law": *Held*, that every legal intendment was in favor of the validity of the judgment.

RECITAL OF LEGAL SERVICE OF SUMMONS IN JUDGMENT. The finding and recital of a legal service of summons in a judgment is as much a part of the record and entitled to the same credence as the file marks of the clerk anterior to such service.

APPEAL from the District Court of the Third Judicial District, Esmeralda County.

This was an action against Sylvester Kean, J. A. Pope, William Talbert, Henry F. Rice, A. W. Pray, Henry Williams, S. B. Maynard, and Wm. A. Bourne to recover judgment on certain promissory notes made by defendant Kean, amounting in all to some \$19,200 and interest, and to foreclose mortgages therefor on certain mines and land in Esmeralda County.

It appears that the sheriff returned the summons on July 11, 1871, with a certificate indorsed thereon of personal service thereof on defendant Kean. Under the said certificate and the indorsement of filing on July 11, 1871, appears a second certificate by the sheriff, as follows:

"And I further certify that I personally served the defendant Henry Williams by delivering to him personally a copy of this summons at Sweetwater, Esmeralda County, on the 19th day of July, 1871; and also that I personally served the defendant Wm. Bourne, by delivering to him personally a copy of this summons in Pine Grove, Esmeralda County, on the 20th day of July, 1871."

It further appears that on August 16, 1871, there was an order entered on the minutes of the court that the sheriff should be allowed to amend his return on the summons by certifying the facts as stated in his second certificate above referred to, and that the cause should be placed upon the

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calendar. On the same day plaintiff dismissed as to defendants Pope, Talbert, Rice, Pray and Maynard; took defaults against defendants Kean, Williams and Bourne, and had judgment entered against them—that is to say, against defendant Kean for the sum of \$24,596 25 in gold coin and foreclosure of the mortgages securing the same and sale of the premises incumbered thereby to satisfy the same, and barring the other defendants of all equity of redemption. The judgment recited that the cause had been “brought on to be heard upon the complaint filed herein taken as confessed by the defendants Sylvester Kean, Henry Williams and Wm. A. Bourne, whose default for not answering has been duly taken and entered, and upon due proof of the service of summons and copy of complaint as required by law,” etc.

The defendant Williams appealed from the judgment.

Mesick & Wood, for Appellant.

I. It is shown by the record that there never was any legal service of process in the action upon the appellant Williams for the following reasons: 1st. The record must be taken as true respecting the acts performed by the sheriff from which service of summons upon the appellant is claimed; and no presumptions can be indulged of any other acts having been performed by the sheriff to effect a service or of any other service having been shown or having existed, except such as the record discloses. *Hahn v. Kelley*, 34 Cal. 391. 2d. It appears from the sheriff's return and the clerk's indorsement of filing that eight days before the copy of summons was served upon Williams the sheriff had returned and filed the summons with the clerk and had no process to serve. The writ had become *functus officio*.

II. After the summons had been returned and actually filed and become a part of the record in the clerk's office it could have had no vitality in the hands of the sheriff, and he could have had, under that state of facts, no power to make further use of it. An alias summons alone could have

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invested him with authority to summon parties not served with the original writ prior to its return by him. *Mayenbaum v. Murphy*, 5 Nev. 383.

III. As to the recitals in the defaults entered and in the decree, they cannot supply any defects in the service apparent on the record; because they must be held to relate to the acts of service done and certified by the sheriff; upon the summons on file. *Hahn v. Kelley*, *supra*. And besides, the clerk was not competent to bind defendants by his declaration of service having been made, nor can the minutes of the court, in which is contained a recital of the service, be of any greater effect.

Robert M. Clarke, for Respondent.

I. The sheriff returns that he served the defendant. This return is not traversable. It is conclusive except in a direct proceeding to set aside the judgment. *Egery v. Buchanan*, 5 Cal. 53; *Gregory v. Fbrd*, 14 Cal. 143.

II. The decree recites that "due proof [was made] of the service of summons." All the legal intendments support this recital. And it is conclusive of this appeal unless it affirmatively and certainly appear from the judgment roll that no legal service was made. It does not so appear. Who can say that an *alias* summons was not issued, that proof was not adduced showing the file mark of the clerk erroneous, or that such filing was indorsed before the summons was returned to the clerk's office, and wrongfully or fraudulently? Clearly these questions cannot be determined on this appeal or otherwise than by a direct proceeding to set aside the judgment for want of jurisdiction in the court.

III. The mere fact that the summons bears a file mark anterior to the date of the service cannot be held conclusive that it had then been returned to the clerk's office; for that is negatived by the fact that afterwards the sheriff had the summons in *his* custody—much less can it be held to prove that no legal service was made, for that is to directly impeach the decree of the court.

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By the Court, BELKNAP, J.:

From the sheriff's return it appears that service of summons was made upon the defendant Kean on the seventh day of July, 1871, and upon the defendants Williams and Bourne respectively on the nineteenth and twentieth days of the same month.

The summons bears the following indorsement by the clerk of the court: "Filed July 11, 1871."

It is contended in behalf of the appellant Williams, against whom a judgment by default was taken, that the file mark of the clerk shows the summons to have been returned before service upon him, and that by returning it the sheriff parted with his control of the writ and it became *functus officio*. Were the rest of the record silent upon the question of service we should proceed to determine whether the court acquired jurisdiction of the person of the appellant by a summons which after having been served upon a co-defendant was returned to the clerk and thereafter withdrawn and served by the sheriff. This question, however, is not presented by this record; for the decree recites that the defendant's default was entered "upon due proof of the service of summons and copy of the complaint as required by law."

The finding of a legal service of summons in the judgment is as much a part of the record and entitled to the same credence as the file mark of the clerk anterior to the service of summons. If the writ became *functus officio* on the 11th day of July and no jurisdiction was obtained by the act of the sheriff of the 19th of July, there is an apparent contradiction in the record. But every legal intendment is in favor of the validity of the judgment, and the presumption arises that other evidence was introduced which established the sufficiency of service of summons to the satisfaction of the district judge. *Hahn v. Kelley*, 34 Cal. 391; *Alderson v. Bell*, 9 Cal. 315.

Judgment affirmed.

State ex rel. Hetzel v. Board of Commissioners of Eureka County.

THE STATE OF NEVADA EX REL. SELDEN HETZEL
v. THE BOARD OF COMMISSIONERS OF EU-
REKA COUNTY.

ORGANIZATION OF EUREKA COUNTY—ELECTION FOR COUNTY OFFICERS. Under section 3 of the act for the organization of Eureka County (Stats. 1873, 107): *Held*, that before an election for county officers could be ordered, it had to be ascertained that five hundred persons had petitioned therefor, and that such petitioners were qualified electors—which facts had to be determined by the county commissioners acting judicially.

MANDAMUS, WHEN IT LIES. Mandamus lies to compel an inferior tribunal to exercise its judgment and render a decision, when a failure of justice would otherwise result from delay or refusal to act; but it does not lie to review or correct its conclusion after it has acted.

This was an original application to the Supreme Court for a writ of peremptory mandamus, as stated in the opinion. The petition alleged that at a regular meeting of the county commissioners on April 21, 1873, six hundred and eighteen qualified electors petitioned the board to order an election of county officers for the first Monday in August, 1873, and that the board had refused to do so. The respondents, D. H. Hall, E. E. Phillips and L. W. Cromer, answered, denying that the petition contained the names of five hundred qualified electors and alleging that they had as a board considered such petition on May 5, 1873, upon which occasion one hundred and thirty-eight of the signers thereof had asked their names to be withdrawn, leaving the number of petitioners less than five hundred. They further alleged that many of the others were not qualified electors.

It appeared from the minutes of the board that it had, upon the presentation of the petitions for an election, taken the matter under advisement; and further, that when asked to name a day for the consideration thereof, it had declined to do so.

Selden Hetzel, for Relator.

- I. The writ applied for is the proper remedy to compel action by respondents. *People v. Sexton*, 24 Cal. 78; *Hastings v. San Francisco*, 18 Cal. 49.

State ex rel. Hetzel v. Board of Commissioners of Eureka County.

II. It certainly cannot be contemplated that a tribunal endowed by the law with *quasi* judicial functions should be enabled by vexatious or formal delays to legislate itself into office in direct contravention of the law. The remedy by mandamus investing the court with such extensive discretionary powers is provided to meet just such an exigency as this; and this would also appear to be a proper case for the awarding of costs at the discretion of the court.

G. W. Baker, District Attorney, for Respondents.

By the Court, BELKNAP, J.:

Application for a peremptory writ of mandamus requiring the county commissioners of Eureka County to order an election as provided by the terms of the act creating the County of Eureka. Section three of said act directs that if on or before the first Monday in July, A. D. 1873, five hundred or more of the qualified electors of the County of Eureka petition the board of county commissioners to order an election for county officers; it shall be the duty of said board to call an election for that purpose to be held on the first Monday in August, A. D. 1873. Before ordering an election two facts are to be ascertained: 1st, whether five hundred persons have petitioned; and 2d, whether they are qualified electors. It is evident that these facts must be determined by the commissioners acting judicially, and we cannot direct the particular decision they shall reach. They must determine the questions presented to them by the dictates of their own judgment.

The writ of mandamus lies to compel an inferior tribunal or board to exercise its judgment and render a decision where a failure of justice would otherwise result from delay or refusal to act. In this case action was taken by the commissioners. Their conclusion may be reviewed and if erroneous corrected, but not by this process.

The application for a writ of mandamus is denied.

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THE STATE OF NEVADA, APPELLANT, v. DAVID W.
FELLOWS, RESPONDENT.

APPEAL FROM ORDER SUSTAINING DEMURRER TO INDICTMENT—RECORD, HOW MADE.

The statute provides for an appeal from an order sustaining a demurrer to an indictment, but makes no provision for a record in such case (Stats. 1861, 485, Sec. 469): *Held*, that such record should be by bill of exceptions and that in the absence of such bill the appeal should be dismissed.

APPEAL from the District Court of the Fifth Judicial District, Nye County.

The indictment alleged that defendant was on or about January 20, 1873, lawfully confined in Nye County jail upon a charge of having committed a felony; that afterwards, to wit: on or about the 22d day of January, 1873, being lawfully confined as aforesaid, he did then and there feloniously, wilfully and without authority of law break out of and escape from said Nye County jail, etc.

Defendant demurred on the ground that the indictment did not state facts sufficient to constitute a public offense. The demurrer was sustained and the State appealed.

Frank Owen, District Attorney, for Appellant.

Bowman & Clayton, for Respondent.

By the Court, WHITMAN, C. J.:

This appeal is from an order sustaining a demurrer to an indictment. The statute expressly authorizes this appeal, but makes no provision for a record in such case. Stats. 1861, 485, Sec. 469. Following the analogies of the statute, the most favorable view to appellant would be to allow the appeal on bill of exceptions. There is none here; so the appeal is dismissed.

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THE STATE OF NEVADA, RESPONDENT, v. H. L. ROBEY,
APPELLANT.

ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF INDICTMENT. An indictment charging that defendant "without authority of law and with malice aforethought did shoot at William Newsom with a shot-gun loaded with leaden bullets, with intent to kill him, the said William Newsom," etc., is a sufficient indictment of the statutory offense of assault with intent to commit murder.

ASSAULT WITH DEADLY WEAPON, ETC., INCLUDED IN "ASSAULT WITH INTENT TO MURDER." An indictment charging an assault with intent to commit murder will sustain a conviction of an assault with a deadly weapon with intent to inflict a bodily injury.

CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE. When a statute has received a judicial construction and is afterwards adopted by another state, the construction as well as the terms of the statute will be deemed adopted.

INDICTMENT FOR FELONIOUS ASSAULT—NON-ESSENTIALS. It is not essential that an indictment or verdict for an assault with a deadly weapon with intent to inflict a bodily injury should state that the offense was committed "without considerable provocation" or "where the circumstances show an abandoned and malignant heart."

APPEAL from the District Court of the First Judicial District, Storey County.

The defendant having been convicted of an assault with a deadly weapon with intent to inflict bodily injury, and sentenced to imprisonment in the State prison at hard labor for one year, took this appeal from the judgment.

Robert M. Clarke, for Appellant.

I. To constitute the crime of "assault with intent to murder," the assault and the intent to murder must concur. It requires the *act* and *intent* combined to constitute the crime. If either be absent the offense is not committed. 1 Bishop's Crim. Law, Sec. 729. And since the crime charged consists in the fact of assault and the intent to murder, both must be alleged in the indictment. 2 Bishop's C. P. Sec. 78; 4 Iowa, 477; 8 Iowa, 413. Tested by these general principles which are universally affirmed by the authorities, the indictment in this case is fatally bad. 1st. It does not contain the statutory word "assault," nor does it state the facts

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which in law constitute an assault. Under the statute in addition to the unlawful attempt, there must exist "a present ability to commit a violent injury." To shoot at is not necessarily an assault. It may be the "person" shot at was out of reach, in which case the "present ability" does not exist. *State v. Swartz*, 8 Ind. 524; *State v. Napper*, 6 Nev. 113. 2d. It does not charge the intent to have been to "murder." The specific intent to murder is that which the statute punishes and that alone which lifts the offense from a simple misdemeanor into a felony; and since all killing is not murder it cannot be sufficient to charge an intent "to kill" merely. 1 Russ. on Crimes, 719; 3 Greenleaf's Ev. Sec. 17; *State v. Hailstock*, 2 Blackf. 257; *State v. Patrick*, 3 Wis. 812. 3d. The indictment is upon the statute and should pursue the technical words of the statute. 1 Bishop C. P. Sec. 612. It is not enough to charge the shooting to have been unlawful and with malice aforethought; for these words simply qualify the assault and do not and cannot be made to elevate the specific intent to kill into the intent to murder. It was, to say the least, necessary to allege the intent to kill to have been "unlawful and of malice aforethought." 2 Bishop C. P. Sec. 77; Archb. Crim. Pl. & Ev. 438.

II. Granting the indictment sufficient as an indictment for "assault with intent to murder," still it is not sufficient as an indictment for "assault with a deadly weapon with intent to inflict upon the person of another a bodily injury where no considerable provocation appears," etc. It does not charge an intent to do a bodily injury; and since the defendant is not accused of this specific intent the accusation is not sufficient to support a conviction of it. Nor does it appear, nor can it be inferred from the indictment, that the assault was made without "considerable provocation." For although if death had resulted, the crime might have been murder, nevertheless "considerable provocation" might have existed. *Carpenter v. The People*, 4 Scam. 197.

III. It is not a felony to assault a person with a deadly

weapon with intent to inflict a bodily injury, where there is considerable provocation. The absence of provocation is of the substance of the crime. *Carpenter v. The People*, 4 Scam. 197. That an assault with a deadly weapon with intent to do bodily injury is not necessarily included in an assault with intent to murder, conclusively appears from the fact that the latter may be committed without a deadly weapon, whereas the former can only be committed with a deadly weapon. Crimes Act, Sec. 47.

IV. An indictment for assault with intent to commit murder will not support a conviction for assault with a deadly weapon with intent to do bodily injury. The specific intent constitutes the crime in either case. And the intent in the cases is different. 1 Russ. on Crimes, 719; 3 Greenleaf Ev. Sec. 17; 1 Wharton's C. L. Sec. 1279; 1 Bishop C. L. Secs. 729-735; *Roberts v. The People*, 24 Mich. 511; *Bonfanti v. The State*, 2 Minn. 123; 37 Me. 468; *Ogletree v. The State*, 28 Alabama, 693; *State v. Morman*, 24 Miss. 54; *Carpenter v. The People*, 4 Scam. 197.

L. A. Buckner, Attorney General, for Respondent.

I. The word "assault" although a technical word is not indispensable in an indictment for the offense charged; a statement of the facts necessary to constitute the offense is all that is essential and such words are used in this indictment. It is true the word "murder" is not in the indictment; but that word, like the word assault, is technical; and the same remarks used in relation to the word assault applies with equal force to the word "murder."

II. The indictment is good as one for an "assault to commit murder," because it pursues the form of such an indictment, which is given in the Criminal Practice Act, and because the sufficiency of such an indictment has been adjudicated in this court and pronounced good. *State v. O'Flaherty*, 7 Nev. 153. If murder is the unlawful killing of a human being with malice aforethought, the indictment does state that the acts to perpetrate this offense by the

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defendant on William Newsom were attempted but were not successfully executed—that is, did not eventuate in death.

III. It has been decided in *People v. Davidson*, 5 Cal. 134, that an assault with intent to commit great bodily injury is necessarily included in the charge of “an assault with an intent to commit murder.” See also, *People v. Vanard*, 6 Cal. 563; *People v. English*, 30 Cal. 218.

IV. In *People v. Nugent*, 4 Cal. 341, it was decided that the omission of the words of the statute, “no considerable provocation appearing, etc.,” from an indictment did not vitiate it; that this constituted no part of the offense and might be shown by way of defense.

By the Court, BELKNAP, J.:

Upon an indictment alleging an assault with intent to commit murder the defendant was convicted of an assault with a deadly weapon with intent to inflict bodily injury. The indictment charges the offense as follows: “That on or about the 11th day of January, A.D. 1873, at the City of Virginia in the County of Storey, State of Nevada, the said H. L. Robey, without authority of law and with malice aforethought did shoot at William Newsom, with a shot gun loaded with powder and leaden bullets, with intent to kill him, the said William Newsom,” etc., etc.

It is urged that this indictment is fatally defective because it does not charge a statutory “assault,” nor a present ability to commit a violent injury. The indictment follows the form prescribed by the statute of 1867, which was fully considered by this court in the case of *The State v. O’Flaherty*, 7 Nev. 153. In considering the substantial, essential and material facts to be found by the indictment, Mr. Justice Garber said: “They are that the defendant, having the ability and intent unlawfully and with malice aforethought to kill, * * * * did attempt so to murder. * * * * It may be conceded that these facts are not alleged artistically and with technical precision—to this end the appropriate word ‘assault’ should have been employed and an intent

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to murder should have been stated. But this is not the question here. It is sufficient, no objection having been made before judgment and the statutory form having been followed, that the requisite facts can be implied from the allegations on the record by fair and reasonable intentment; and that the issue joined was such as necessarily required on the trial proof of such facts. Thus tested the indictment is good. The words 'shoot at' had, before the statute prescribed this form, acquired a definite meaning in law, and had been held to imply that the person shot at was within range and distance. And under indictments charging a shooting at another with a loaded pistol or the like, it was always permissible and necessary to prove the preparation and efficiency of the weapon and other circumstances evincing the ability of the defendant to do the mischief intended. It is also substantially alleged that the mischief here intended was to murder. * * * * The words 'without authority of law and with malice aforethought,' applied to the shooting, extend on and qualify the intent alleged, and so equally refer to the subsequent words 'to kill.'"

It is insisted by appellant's counsel that an indictment charging an assault with intent to commit murder will not sustain a conviction of an assault with a deadly weapon with intent to inflict a bodily injury; that the specific intent to inflict a bodily injury as distinguished from an intent to murder must be set out in the indictment. In support of this view the following authorities are relied upon: *Bonfanti v. The State*, 2 Minn. 123; *The State v. O'Neal*, 37 Maine, 468; *Ogletree v. The State*, 28 Ala. 693; *Morman v. Mississippi*, 24 Miss. 54; *Carpenter v. The People*, 4 Scam. 197. At common law under an indictment charging the higher offense the defendant could be found guilty of a lower grade of offense of the same generic character. Thus upon an indictment for murder he could be convicted of any grade of homicide. Upon an indictment for grand larceny he could be found guilty of petit larceny. "And in general," says Mr. Chitty, "when from the evidence it appears that the defendant has

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not been guilty to the extent of the charge specified he may be found guilty as far as the evidence warrants."

In *MacKalley's Case* it was said: "So if one is indicted of the murder of another upon malice prepense and he is found guilty of manslaughter, he shall have judgment upon this verdict, for the killing is the substance and the malice prepense the manner of it; and when the matter is found, judgment shall be given thereupon although the manner is not pursued; and therewith agrees Plow. Com. 101 b., where it is said, 'when the substance of the fact and the manner of the fact are put in issue together, if the jury find the substance and not the manner, judgment shall be given for the substance.'" 9 Rep. 67 b. In like manner Coke: "For if A be appealed or indicted of murder, viz: that he of malice prepense killed I, A pleadeth that he is not guilty *modo et forma*, yet the jury find the defendant guilty of manslaughter without malice prepensed; because the killing of I is the matter, and malice prepensed is but a circumstance." Co. Litt. 282; Cro. El. 464. And Phillips says that upon an indictment for murder, malice is a circumstance in aggravation and may therefore be rejected and manslaughter found. 1 Phil. Ev. 203.

The same view has been taken by the courts of this country. It was provided by the statutes of Massachusetts that every person having in his possession ten or more pieces of false money, knowing the same to be false, with intent to utter, etc., should be punished by imprisonment in the state prison for life, or for any term of years. It was also provided that every person who should have in his possession any number of pieces less than ten should be imprisoned not more than ten years in the state prison, or by fine and imprisonment in the county jail. The defendant was indicted for having in his possession more than ten pieces of counterfeit coins; the verdict found him guilty of having in his possession four pieces. It was contended that the verdict was in effect a verdict of not guilty, and that the jury could not find the defendant guilty if he had a less number than ten pieces, for that was a distinct offense. But these

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objections were overruled by the court. Chief Justice Shaw in delivering the opinion said: "Although the general rule is that every material averment must be proved, yet it by no means follows that it is necessary to prove the offense charged to the whole extent laid. It is quite sufficient to prove so much of the charge as constitutes an offense punishable by law. * * * * * The substance of the crime in the case before us is the possession of counterfeit coins, with the guilty knowledge and intent indicated; and this is a substantive offense whether the number of pieces be over or under ten. The party was therefore found guilty of the offense stated, though not to the extent laid in the indictment. *Commonwealth v. Griffin*, 21 Pick. 523.

Do the authorities relied upon to reverse the judgment in the case at bar contravene the common law rule as thus stated? In *Bonfanti v. The State of Minnesota*, the defendant was indicted for assault with intent to murder. Upon the question of existence of the intent to murder to make out the crime charged, the court held that in order to convict of an assault with intent to murder the jury must find the existence of the intention in the mind of the defendant to murder the party assaulted; for in the absence of that intention there existed but the simple assault. The question whether the defendant could be convicted of a lesser offense in nowise arose and was in no manner considered by the court. Subsequently, however, this question did arise in Minnesota in the case of *The State v. Lessing*, 16 Minn. 75; and it was decided that an indictment for the higher degree would sustain a conviction for a lesser degree of the same offense.

In *State v. O'Neal*, 37 Maine, 468, it was well held, as in Bonfanti's case, that in order to convict of an assault with intent to commit murder the specific intent must be established. The evidence did not show that an intention to murder existed, and the verdict was set aside. The courts of Maine have adhered to the common law rule. In *The State v. Waters*, 39 Maine, 54, it was decided that an assault with intent to murder necessarily embraced an assault

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with intent to kill, and one accused of the greater could be found guilty of the lesser offense.

In the Alabama case the indictment alleged an assault with intent to murder one *Tiller*, and to prove this intent threats to murder *Mitchell* were admitted in evidence. The court held that the class to which this offense belonged was distinguished from the class in which a *general* felonious intent is sufficient to constitute the crime, and that the defendant should not have been convicted of the offense charged unless his intent in fact was the same as laid in the indictment; in other words, "a threat of the defendant made at a particular time to kill a particular man is not legal evidence to prove that at a subsequent time he assaulted a different man, or that he intended to murder a different man." The effect of these decisions is that the existence of the specific intent to murder must be found in order to convict of an assault with intent to murder. In Alabama (33 Ala. 389) it has been adjudged that a person indicted for one felony can be convicted of another felony necessarily included in the one charged. So the court refused to arrest judgment where the defendant was convicted of voluntary manslaughter upon an indictment charging murder.

It was decided in *Morman v. The State of Mississippi* that an indictment for "an assault and battery with a deadly weapon with intent to commit murder" did not embrace "an assault with intent to commit manslaughter." Under the statutes of Mississippi they are distinct offenses. A deadly weapon is an indispensable ingredient of the former offense, and must be alleged and proved. An assault with intent to commit manslaughter is not necessarily made with a deadly weapon. This distinction was also taken in the case of *The People v. Vanard*, 5 Cal. 562, where it was said: "It is apparent that the weapon or instrument with which the assault was committed should be alleged and found, as the fact that the assault was made with a deadly weapon, etc., is of the substance of the offense and distinguishes it from an ordinary assault."

The defendant must be fully informed of the charge, as if one be indicted for shooting with intent to kill A, he cannot be convicted by proof of shooting with intent to kill B; and if the intent to murder by drowning, poisoning or other means be charged, proof of the intent by shooting will not suffice. So in the case of *Carpenter v. The People*, it was declared that upon an indictment for assault with intent to commit murder the accused could not be convicted of assault with intent to commit bodily injury, and that to constitute the latter offense the assault must be made with a deadly weapon. The case is not fully reported, and it is probable that the indictment did not charge the use of a deadly weapon, for the court says: "We are therefore of the opinion that on the indictment in question the jury were not authorized to find the defendant guilty of an assault with intent to inflict a bodily injury." The same court afterwards held that an indictment for assault with intent to commit murder by means of a butcher knife embraced the lesser offense of assault with a deadly weapon with intent to inflict bodily injury, and we have followed their interpretation of the case against Carpenter. *Beckwith v. The People*, 26 Ill. 500. In Mississippi the common law rule has been recognized and adopted. *King v. The State*, 5 Howard, 730; *Hart v. The State*, 25 Miss. 378.

Section 412 of the Criminal Practice Act of the State of Nevada is, with some exceptions, declaratory of the common law. It provides: "In all cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense charged." This section is a literal copy of section 424 of the act regulating proceedings in criminal cases of the state of California, and before its adoption by the legislature of our State had received a judicial construction by the California supreme court. It is well settled that where a statute has received a judicial construction and is afterwards adopted by another state, the construction as well as the terms of the statute will be deemed adopted. It is presumed that the

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legislature intended to adopt the received construction; different language would have been employed had the intention been to exclude it.

In *People v. Davidson*, decided at the January term, 1855 (5 Cal. 134), the court held that an assault with a deadly weapon with intent to inflict bodily injury was necessarily included in an indictment charging an assault with intent to commit murder. A verdict for the lesser offense was held regular, and judgment thereupon sustained. The identical question was again before the court in *People v. English*, 30 Cal. 217, and the decision in *People v. Davidson* was followed and approved. Authorities in support of the views herein expressed are numerous. In addition to those already referred to the following may be cited : 22 Wend. 167; 17 Wend. 386; 3 Hill, 93; 5 Porter, 523; 7 Porter, 495; 5 Ala. 477; 5 Harris, 126; 5 Barr, 83; 1 Yeates, 6; Rice, 432; 15 Mass. 187; 7 Conn. 54; 9 Conn. 259; 5 Mo. 497.

It is also assigned as error that it does not appear from the indictment or the verdict that the offense was "committed without considerable provocation," or "where the circumstances show an abandoned and malignant heart." These are negative qualifications of the offense and are not essential to either the indictment or verdict. They must be taken advantage of in defense at the trial. *People v. Nugent*, 4 Cal. 341; *People v. Kennedy*, 5 Cal. 134; *People v. Vanard*, 6 Cal. 562; *People v. English*, 30 Cal. 214.

After a careful consideration of this appeal we are of the opinion that the judgment is sustained alike by reason and authority. The defendant was fully informed by the indictment of the charge against him and of the means employed in committing it. He is accused of intent to murder by shooting; murder by shooting can not be effected without bodily injury. The offense of which he was convicted is therefore necessarily embraced in the one charged. By the indictment he is charged with the particular act of which he was convicted, but in a higher grade of crime. The particular act is found; the means employed in its perpetration

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are found as charged; but instead of an intent to murder the jury find an intent to do bodily harm. The conviction of the lesser crime could not have prejudiced his defense.

It is ordered that the judgment be affirmed.

O. M. EVANS, APPELLANT, *v.* J. H. JOB *et als.*,
RESPONDENTS.

ACT FOR REMOVAL OF COUNTY SEAT OF HUMBOLDT COUNTY NOT UNCONSTITUTIONAL. The act of 1873 to remove the county seat of Humboldt County from Unionville to Winnemucca (Stats. 1873, 59) is not in violation of sections 20 and 21 of article IV of the constitution.

CONSTRUCTION OF CONSTITUTION, ART. IV, SECS. 20 AND 21. Sections 20 and 21 of article IV of the constitution were intended to prohibit the legislature from passing any local or special law in any of the cases enumerated in section 20 and in all other cases where a general law would be applicable—that is, adapted to the wants of the people, suitable to the just purposes of legislation or to effect the object sought to be accomplished.

CONSTITUTIONAL PROHIBITION AGAINST LOCAL AND SPECIAL LEGISLATION. The constitutional provisions prohibiting local and special legislation (Const. Art. IV, Secs. 20 and 21) recognize the fact that cases would arise in the ordinary course of legislation requiring local or special laws to be passed—cases where a general law might be applicable to the general subject but not applicable to the particular case.

WHEN GENERAL LAWS SHOULD BE DEEMED “APPLICABLE.” A general law should always be construed to be “applicable” in the constitutional sense, where the entire people of the State have an interest in the subject, such as regulating interest, the statutes of frauds and limitations, etc.; but where only a portion of the people are affected, as in locating a county seat, it will depend upon the facts and circumstances of each particular case whether such a law would be applicable.

PRESUMPTION OF CONSTITUTIONALITY OF LOCAL OR SPECIAL LAW. Where a local or special law has been passed in reference to a matter affecting a portion only of the people, it will be presumed to be valid until facts are presented showing beyond any reasonable doubt that a general law is applicable.

PRESUMPTION IN FAVOR OF SPECIAL AS AGAINST GENERAL STATUTE. The mere fact that a general law has been passed providing for the removal of county seats is not proof that it is applicable to a particular case; and if a special act be passed for the particular case, the presumption of the applicability of the general law is overcome by the presumption, in favor of the special act, that the general act was not applicable in that case.

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STATUTE GOOD IN PART AND BAD IN PART. If, when an unconstitutional portion of a statute is stricken out, that which remains is complete in itself and capable of being executed wholly independent of that which was rejected, it must be sustained.

MEANING OF WORD "WEEK." The word "week" in the provision of the act of 1873 for the removal of the county seat of Humboldt County that all the offices shall be removed to Winnemucca "on the week next preceding May 1, 1873" (Stats. 1873, 59, Sec. 2), does not mean the week ending at 12 o'clock on Saturday night but the seven days prior to May 1, 1873.

PLEADING OF CONCLUSION OF LAW—NO NEED OF DENIAL. Where a complaint for an injunction to prevent the removal of a county seat in accordance with a special statute (Stats. 1873, 59) alleged that "said act is a special law in a case where a general law of uniform operation throughout the State exists and can be made applicable": *Held*, that such allegation stated a mere conclusion of law and defendant was not required to answer it.

DOCTRINE OF STARE DECISIS. It is an almost universal rule in construing statutes and constitutions to adhere to former decisions.

APPEAL from the District Court of the Fourth Judicial District, Humboldt County.

This was an action for an injunction to prevent J. H. Job, Samuel Bonnifield, Christ. Lark, C. A. Kyle, Samuel King, James Mather and Thomas V. Julian, being clerk, recorder, treasurer, assessor, sheriff, surveyor and district attorney of Humboldt County, respectively, from removing their offices from Unionville to Winnemucca. The plaintiff alleged himself to be a citizen, resident, tax payer and real estate owner of Unionville and that the proposed removal of the county offices would damage, retard and impair public business and inconvenience and damage the plaintiff and other citizens. He also alleged that the act of February 17, 1873 (Stats. 1873, 59), under which defendants threatened to act, was unconstitutional for the reasons that it was a special law in a case where a general law of uniform operation throughout the State existed and could be made applicable, that it was a special law regulating county business, that it required the removal of the offices to a place which was not the county seat, and that it was void for uncertainty.

An injunction having been denied, the plaintiff appealed from the order.

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Robt. M. Clarke, for Appellant.

I. There is no remedy but injunction, and injunction is the remedy. The proceeding is not to redress but to prevent an injury. *Thomas v. Com. Clay County*, 5 Indiana, 4; *Hess v. Pegg*, 7 Nev. 20; *Sherman v. Clark*, 4 Nev. 145.

II. Sections 3 and 4 of the act attempt in a special and exceptional manner to regulate "county business," which is expressly inhibited by the constitution. Art. IV, Sec. 20, Sub. 9. That an act directing the removal of the personal property and the sale of the real property of a particular county and providing for the renting, building or purchase of rooms or offices for county officers of a particular county in any exceptional manner is a local and special law regulating county business, is too plain for argument. Stats. 1871, 48; *Williams v. Bidleman*, 7 Nev. 70.

III. Section 2 of the act requires the officers to remove their offices to Winnemucca "on the week next preceding the first day of May, A. D. 1873." The first day of May was Thursday; the "week next preceding the first day of May" ended at 12 o'clock the Saturday preceding Thursday. It follows that the law required the county officers to have their offices at Winnemucca at least four days before May 1 and before Winnemucca was the county seat, which is forbidden by the constitution. "All county officers shall hold their offices at the county seat of their respective counties." Art. XV, Sec. 7. A "week" in the law is a definite, well understood and particular period of time commencing immediately after 12 o'clock Saturday night and ending at 12 o'clock Saturday night, seven days thereafter. 2 Bouvier's Law Dic. 647; 4 Peters, 361; 1 Mass. 256; 1 Barb. 46; 1 Selden, 517; 21 N. J. 151; 16 Barb. 350; 59 Me. 192; 16 How. 610; 32 Cal. 350; and particularly *State v. Yellow Jacket Co.*, 5 Nev. 415. But in any view of when the week commences it is indisputable that the officers are required to remove their offices to Winnemucca at some time before the first day of May; and whether this be the *week* or *day* preceding is immaterial, for under the constitution they could

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not be required to move their offices away from Unionville so long as Unionville was the county seat, and Unionville was the county seat until the first day of May. Sections 2, 3 and 4 are therefore all void, and nothing is left of the act but section 1.

IV. Section 1 fixes the county seat at Winnemucca on and after the first day of May. There are no public buildings in Winnemucca; no offices have been provided for the transaction of public business; no place has been secured for the safe keeping of the public records and archives. Can the court say this condition is consistent with the object the legislature had in view? Can the court say that in these circumstances the legislature would have enacted section 1 alone? To justify the preservation of part of an unconstitutional act the court should be convinced that what is preserved is not only constitutional but complete, and that the legislature would have enacted what the court preserves without reference to what the court destroys; otherwise the entire act must fall.

V. The act is unconstitutional and void, because it is a "local and special law in a case where a general law of uniform operation throughout the State is applicable." *Town of McGregor v. Baylies*, 19 Iowa, 46; *Hess v. Pegg*, 7 Nev. 30; *Thomas v. Com. Clay County*, 5 Ind. 5. What is meant by "cases where a general law can be made applicable"? The word "cases" occurs twice in section 21 of article IV of the constitution, and in the same connection and therefore in the same sense. The "cases" prohibited by section 21 must be of the kind or class specified in section 20; that is, a subject as "granting divorces," or "relocating county seats," not a particular thing as granting a divorce or relocating a county seat. The intention was to prevent the passing of local or special laws in *all* cases where a general law would be made applicable. The object was not to confer any power on the legislature, but to restrain that body in the exercise of an inherent power of sovereignty, which in the absence of such a restriction it would possess. *Gen-tile v. The State*, 29 Indiana, 413; *Ex parte Pretz*, 9 Iowa, 33;

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State ex rel. Stoutmeyer v. Duffy, 7 Nev. 353; *Thomas v. Com. Clay County*, 5 Ind. 5. Section 21 of our constitution was borrowed from the constitution of Indiana. Const. Ind. Sec. 23; *Hess v. Pegg*, 7 Nev. 27. At the time it was borrowed the supreme court of Indiana had interpreted the section to have reference to the general subject of the "removal of county seats." *Thomas v. Com. Clay County*, *ante*. This interpretation was borrowed with the provision. *Ash v. Parkinson*, 5 Nev. 15; *Hess v. Pegg*, 7 Nev. 27. The interpretation thus became a part of the fundamental law; and the court can no more disregard it than they can disregard the constitutional provision itself.

VI. A general law upon the subject of removing county seats exists and is complete in all its parts. Stats. 1867, 78. In the view we have taken the fact of the general law is conclusive of this case. "But finally, all speculation upon this last proposition is unnecessary, for a general law upon this subject has been passed, and thus all room for doubt is removed." *Ex parte Pretz*, 9 Iowa, 36; *Town of McGregor v. Baylies*, 19 Iowa, 48. But if these decisions upon a constitutional provision word for word like our own (Const. of Iowa, Art. III, Sec. 30) are not to be followed, nevertheless the general law must be held applicable; because its applicability to the *subject* is established by the fact that under and pursuant to its provisions the county seat of Humboldt County was relocated at the town of Unionville in the year 1869, and the county seat of Churchill County was removed from La Plata to Stillwater. Though it be not sufficient to establish the applicability of the law to prove its existence; yet it must be sufficient to show in addition thereto that under it the objects and purposes of the legislature in its enactment have been accomplished or may be accomplished. Unless this be true no degree of proof will satisfy the judicial mind; and the mere fact of a "local" or "special" law will be conclusive of the subject.

VII. Again, it is alleged in the complaint that "said act is a special law in a case where a general law of uniform operation throughout the State exists and can be made appli-

cable." This allegation is not denied in the answer nor otherwise controverted except by the suggestion that it is a "proposition or conclusion of law." It is not a conclusion of law, but a fact necessary to be proved and therefore proper to be pleaded. If a fact, and material, and pleaded, it must be denied or it will be taken as confessed. That it is a fact, see *Gentile v. The State*, 29 Ind. 413; *Hess v. Pegg*, 7 Nev. 28.

VIII. Primarily the legislature must decide whether or not in a given case a general law can be made applicable; but such decision may be reviewed and upheld or reversed by the courts. *Hess v. Pegg*, 7 Nev. 28. Here it is apparent beyond doubt that the act in question is "local" and "special" and that a general law can be made applicable to the case. Nothing remains but the simple question, will the court execute the command of the constitution? Will it enforce the limitations the people have solemnly imposed upon the legislative power, or will it open still wider the door through which the infinite mischiefs of special legislation may be inflicted on the people? The case is one of the greatest importance, not in its immediate results, but in its remote consequences; for if the law be upheld the principles upon which alone it can be upheld remits the people to that unfortunate condition and inflicts upon them those great evils which prevailed during our territorial existence, when the chief business of the legislature was the enactment of special laws, and to prevent which the convention incorporated section 21 in the fundamental law. In short, if the law is upheld it must be not only at the sacrifice of the constitution but the peril of the public welfare.

IX. Finally it is submitted that this case is decided—decided as explicitly as though it were written in the paramount law—that "no local law should be enacted removing a county seat." Section 21 of the constitution is borrowed from the constitution of Indiana. *Hess v. Pegg*, 7 Nev. 27. At the time of its adoption by the convention and people of Nevada the provision had been interpreted by the supreme court of Indiana, and held to *deny* the

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legislature the power to remove a county seat by local or special law. *Thomas v. Com. Clay Co.*, 5 Ind. 4. In adopting the provision we adopted also the interpretation which it had received. *Ash v. Parkinson*, 5 Nev. 15; *Hess v. Pegg*, 7 Nev. 27; *People v. Coleman*, 4 Cal. 46; *Anderson v. Milliken*, 9 Ohio, 579. We invoke then as conclusive of this case the decision in *Thomas v. Com. Clay Co.* We invoke it because of the force of its reasoning and the soundness of the principles it establishes. We invoke it because (except as to the power of the court to review the legislative decision) it is nowhere questioned and has been repeatedly followed and upheld. We invoke it especially because the people of Nevada have adopted it, and solemnly incorporated its principles into their fundamental law.

Lewis & Deal, for Respondents.

I. This is not a case for injunction, although we admit there are cases which appear to sustain such a proceeding.

II. The real question involved is settled in this court by the cases of *Hess v. Pegg*, 7 Nev. 28, and *Clarke v. Irwin*, 5 Nev. 124. It is not claimed that there is any distinction between this case and that of *Hess v. Pegg*, except that in this, evidence was introduced by the plaintiff in the court below. But how that evidence bears on the question whether a general law could be made applicable is entirely beyond our comprehension; and what possible bearing the testimony has upon the real question involved is equally beyond the reach of our understanding. That Evans' taxes would be increased by the removal—that he owned property in Unionville which might be affected by such transfer of the county seat—that California and other states have laws general in their character for the removal of county seats—in no wise aids in establishing the fact that a general law could be made applicable to the case of Humboldt County, nor in any manner makes this case different from that of *Hess v. Pegg*.

Suppose a general law on the subject of county seats does exist? The question still remains, is it applicable to the cir-

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cumstances making the removal of the county seat of Humboldt necessary? And it may very well be said as was said in *Hess v. Pegg*, that the existence of the general law at the time of the passage of the special act only increased the presumption that the legislature at least thought the general law not applicable. Such is the irresistible conclusion. There is really no distinction whatever between this case and that of *Hess v. Pegg*, and we therefore invoke the rule of *stare decisis*. No decision should be reversed except upon the most urgent necessity and the clearest conviction that it is incorrect, especially a decision interpreting statutes and constitutions. 5 Nev. 120; 5 Cal. 403; Sedgwick on Const. Law, 253. Should the decision of *Hess v. Pegg* be set aside it would result that the people of Washoe County would have imposed upon them useless expense by the erection of county buildings at Reno which could be of little or no use. And again, it is quite probable, nay almost certain, that all the decisions of the district court rendered at Reno would be null and void; for the mere fact that the Supreme Court has upheld the law locating the county seat at that place does not by any means render acts valid which are done under an unconstitutional law. The law if in conflict with the fundamental law is a nullity from the beginning, and the decision of a court does not make it valid.

III. The constitution must if it admits of two interpretations be so construed as to sustain any act of the legislature rather than to annul it. 11 Wend. 511. If then the sections of the constitution involved in this case can be so construed as to sustain the act without doing absolute violence to the language, that construction must be adopted. Now, evidently, the general object of the framers of the constitution, in adopting sections 20 and 21 of article IV of that instrument, was to secure general laws wherever they could be appropriately adopted. General laws are laws which reach all persons or all subjects similarly situated or circumstanced. To be general no law need reach cases unlike nor persons dissimilarly situated. It follows that the

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legislature would not be called upon to pass a law for the removal of county seats, which would include Humboldt County, unless the facts making the removal necessary in that county were the same as in other counties. Whether they were the same or not certainly is not shown to this court; and it cannot know that they were, unless it can place itself in the place of the legislature, or unless it have the evidence or facts which were presented to that body before it; and that it has not. General laws are only to be passed when they are applicable. "Applicable" means suitable, fit, corresponding with or having analogy to. A law is, then, applicable when it fully executes or effects the purpose of the legislature or the object desired to be accomplished—when it meets fully and completely the emergency which makes the passage of the law necessary. For example, if the facts of the case be such as to make haste necessary, or such as to make it necessary for the legislature to designate a particular place for a county seat, as was done in this case, a law which would not speedily effect the purpose in the first case or which would not necessarily locate the county seat in the latter at the desired point, would certainly not be applicable or suitable; it would in neither case accomplish the purpose of the legislature. See *Clarke v. Irwin*, 5 Nev. 122; 1 Kansas, 178; 7 Nev. 353. In this case the immediate object of the legislature was the removal of the county seat of Humboldt from one place to another specified in the act. This end could not possibly be accomplished except by a special act. The county seat could not be located at Winnemucca by a general law. Hence if the purpose of the legislature is to be accomplished at all—if it is not to be entirely defeated, the law adopted by it must be upheld.

IV. Manifestly section 21 of article IV of the constitution only prescribes the manner in which the legislature shall execute its functions. Its functions are as potent and extensive as if this section did not exist, but the method whereby those functions are to be exercised are regulated; and this is all that is sought to be effected by section 21. The consti-

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tution says in clear and unmistakable terms to the legislature: the powers which you naturally possess or are given to you by other portions of this constitution to effect any given end or to accomplish any legitimate purpose of legislation, are not in any wise limited by this section; but in exercising those powers or in effecting those ends you must adopt a general law if you can. If you cannot then you may effect the same end by a special law.

V. Neither can this court say that a general law would be applicable to this case even if no particular town were named in the act to which the county seat was to be removed. To determine whether a general law can be made applicable it is not the subject of legislation alone which is to be considered; but, first, the subject; and, second, the circumstances making the removal necessary. Facts might exist making the removal of the county seat necessary immediately, and this could not be accomplished by a general law perhaps; or a county might be divided and the new county requiring a county seat immediately could have it perhaps only by means of a special law; or facts might exist making it inexpedient to have a county seat at any but one particular town in a county which could probably be located at that place only by special law. This court does not know that such facts did not exist, nor can it know, and therefore it cannot say, that a general law could be made applicable.

VI. But the first section of the act is not necessarily void simply because some other section is unconstitutional; certainly not if the purpose of the legislature can still be accomplished. *State v. Eastabrook*, 3 Nev. 180; 32 Md. 369. Here the main purpose of the legislature is embodied in the first section; the other sections are simply adopted as the means for carrying out that purpose. As there are general laws, which will as effectually enable that purpose to be carried out as the sections adopted by it in this act, there is no reason why the first should not stand even if it be admitted that all the others are repugnant to the constitution. It is a complete act in itself. No other sections or provisions were really necessary.

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VII. As to the admissions in the answer, we doubt if the point should be noticed; but it may as well be suggested that when a mere legal proposition is alleged in a pleading and reasons are given for it, the failure to deny such allegation does not amount to an admission either of the proposition of law or the reasons. In other words, when a brief is filed instead of a complaint, the defendant need not deny the argument.

By the Court, HAWLEY, J.:

This action was brought to restrain defendants, the county officers of Humboldt County, from removing their offices from the town of Unionville to Winnemucca in said county. The appeal is from an order of the court denying an injunction.

The legislature of this State at its last session passed "An act to remove the county seat of Humboldt County," which provides as follows:

"Section 1. From and after the first day of May, one thousand eight hundred and seventy-three, the county seat of Humboldt County shall be located at the Town of Winnemucca in said county.

"Sec. 2. It shall be the duty of all officers of said county, who are required by law to keep their offices at the county seat, to remove the same to said Town of Winnemucca on the week next preceding the said first day of May, A. D. eighteen hundred and seventy-three.

"Sec. 3. The county commissioners of said county shall provide for the removal of the archives of said county and all other movable property belonging to said county to said Town of Winnemucca, and shall have power to sell and convey any real or immovable property situated in the Town of Unionville belonging to said Humboldt County, and shall pay the proceeds of such sales into the county treasury of said county.

"Sec. 4. It shall be lawful for the board of county commissioners of Humboldt County, and it is hereby made their

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duty, to provide for the use of the various public officers such buildings, rooms or offices as are required by law." Stats. 1873, 59.

The validity of this act is the only question to be determined. It is claimed by appellant that said act is in violation of Art. IV, Sec. 21 of the constitution of this State. The constitutional provisions necessary to consider are as follows:

"SEC. 20. The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:" [enumerating thirteen distinct subjects.]

"SEC. 21. In all cases enumerated in the preceding section and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."

Probably no questions are ever presented to a court requiring more careful consideration than those involving a construction of the provisions of the constitution. The constitution ought always to be construed according to its true spirit and with special reference to carrying out the intention of those who framed it; taking into view the evils that were to be remedied, the dangers sought to be guarded against and the protection to be afforded. Sections 20 and 21 were doubtless incorporated into our State constitution to remedy an evil into which it was supposed the territorial legislature had fallen in the practice of passing local and special laws for the benefit of individuals instead of enacting laws of a general nature for the benefit of the public welfare. These sections were intended to prohibit the legislature from passing any local or special law in any of the cases enumerated in section 20, and to limit the passing of other local or special laws in all other cases where a general law would be applicable, that is to say, where a general law would be adapted to the wants of the people, suitable to the just purposes of legislation or effect the object sought to be accomplished.

It is evident to our mind that the framers of the constitution recognized the fact that cases would arise in the ordi-

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nary course of legislation requiring local or special laws to be passed, in cases where in their opinion a general law might be applicable to the general subject but not applicable to the particular case. In other words, that a general law could not always be so moulded as to meet the exigencies of every case not enumerated in section 20. Without this right of discrimination the wheels of legislation would often be materially clogged and the wants and necessities of the people liable to be hampered, and the relief to which they were otherwise entitled oftentimes necessarily delayed.

The real difficulty lies in determining the exact boundary within which it was intended the legislature should be confined. That it was the intention of the framers of the constitution to allow the legislature to pass some local and special laws is apparent from the language used, "in all other cases where a general law can be made applicable," admitting as they here do that general laws would not be applicable in some cases. If they had intended to prohibit the passage of any local or special law they would have left out the enumerated cases and only said, "the legislature shall not pass any local or special laws." So far, we think the intention clear. But when we come to the consideration of the vital question, whether or not in any given case where a local or special law has been passed (not enumerated in section 20), a general law is or can be made applicable, we are liable unless we closely observe and strictly follow the ancient landmarks of interpretation, to be cast out upon a sea of uncertainty, without sail or rudder and with no safe guide to bring us on shore.

There is a certain class of local legislation, analogous to that under consideration, which has always been exercised by the legislature and acquiesced in by the people of this State, where any one acquainted with the elementary principles of legislation must know that a general law could be passed and made applicable to the subject. Yet it might not be applicable to every county in the State. We allude to the regulation of the salaries of the district judges and district attorneys throughout the State. Take for example the

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office of district attorney: would it be fair that the salary of this officer in the County of Churchill should be the same as in Storey or Lincoln, where probably ten times the amount of business is transacted? Certainly not. To cure this objection the general law might provide that in counties where the population was one thousand or less the officer should receive a stipulated sum, and then adopt a scale of prices regulated by the population of the county, or provide that the salary during the term of office should be regulated by the number of voters at the time of the election of the officer. Would such a law be suitable for every county in the State? Is it not a fact that in certain counties there is more business to be transacted by this officer than in others of equal population? Is it not true that in new counties or in counties where the principal business is that of mining, there is more business for this officer to attend to than in counties where the principal business is farming and agriculture, and that in such counties there might be a necessity for a local law providing greater compensation? Such a law as we have mentioned might be applicable to some of the counties, but circumstances might arise in others making it necessary to pass local laws. So in regard to the location of county seats, there may be circumstances making it necessary to pass local laws.

In *State v. Johnson*, 1 Kan. 184, a case very similar to the one under consideration, the court said "there might be strong reasons arising from change of county lines or other causes for the passage of a law, such as the one in question, authorizing an election in a particular county to change the county seat; and yet there might be no circumstances existing or likely to arise in any other than that one county making such election expedient." In the absence of any showing of facts courts will presume that such exigencies exist. In *Wellington v. Petitioners, etc.*, Shaw, C. J., said: "If a legislative act may or may not be valid according to circumstances, courts are bound by the plainest principles of exposition as well as by a just deference to the legislature to

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presume the existence of those circumstances which will support it and give it validity." 16 Pick. 97.

If we adopt the views so earnestly contended for by appellant it would be impossible for the legislature to pass any local or special law, because all subjects of legislation are more or less general; and to say that when the subject of the law was general a general law would be applicable would prohibit the legislature from passing any local or special law.

The organization of new counties is a subject upon which a general law could be passed and might be applicable in some cases. But insuperable difficulties might arise in others. Yet it being a general subject it would from the standpoint of construction adopted by appellant call for a general law; and although the exigencies or necessities of the case might demand a special law, it would be the duty of courts to declare such law unconstitutional. We are unwilling to place such an illiberal construction upon the constitution. We do not think that such an interpretation was ever intended by the men who framed it or the people who voted to adopt it.

It must be admitted as was said in *Gentile v. State*, that the object of section 21 "was not to confer any power on the legislature but to restrain that body in the exercise of an inherent power of sovereignty, which in the absence of such a restriction it would possess." 29 Ind. 413. The idea was, as we interpret the meaning, that no local or special laws should be passed in any of the cases enumerated in section 20. In all other cases local or special laws might be passed (as without section 21), when a general law would not meet the just purposes of legislation. But if a general law would accomplish that purpose it must be enacted.

We do not believe that any general rule can be laid down to determine the question of the validity of any local or special law under section 21. But it may we think with safety be said that a general law should always be construed by the courts to be applicable in all cases where the subject is one in which from its very nature the entire people of the State have an interest, as for instance regulating interest,

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regulating common schools, statute of frauds, statute of limitations, and like subjects of legislation. But when only a portion of the people of the State are to be affected as in the case of locating county seats, then it must necessarily depend upon the particular facts and circumstances of each particular case, and no general rule can be laid down except this, that where a local or special law has been passed it will be presumed to be valid until facts are presented showing beyond any reasonable doubt that a general law is applicable.

In considering the question whether or not a certain act of the legislature was valid, C. J. Shaw said: "The delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." *Wellington v. Petitioners*, 16 Pick. 95. In *Fletcher v. Peck*, C. J. Marshall said: "The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case." 6 Cranch. 128. And the views of these eminent jurists have universally been quoted with approval. See Cooley on Const. Lim. 182, 183, and authorities there cited; also, *Griffin's Ex. v. Cunningham*, 20 Grattan, 34; *Clark v. People*, 26 Wend. 606; *Sharpless v. Mayor of Phil.* 21 Pa. 164; *Foster v. Essex Bank*, 16 Mass. 253.

It was contended by respondents that the final determination of this question was with the legislature, and that courts should not interfere with its decision. It has been decided in this State that it was first for the legislature but finally for the courts to determine whether or not a general

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law could be made applicable (*Clarke v. Irwin*, 5 Nev. 124; *Hess v. Pegg*, 7 Nev. 28; *Stoutmeyer v. Duffy*, 7 Nev. 348); and such decision is in accordance with our present views, and is sustained by the weight of reason and a large preponderance of authorities. Cooley's Const. Lim. Secs. 78, 79, 80, 81, 82, 83, and authorities there cited.

The decision of the legislature will be consulted as an index of other minds, and will be regarded with the consideration due one department of the government by another. In *Coutant v. People* the court said: "Upon a question of real doubt as to the meaning of a particular clause in the constitution, a legislative construction, if deliberately given, is certainly entitled to much weight, although it is not conclusive upon the judicial tribunals." 11 Wend. 514; *Moore v. Veazie*, 32 Me. 360. This being true, upon what principles are courts to be governed in determining this vexed question? We must either adopt the views we have heretofore suggested, or accept the position contended for by appellant. To sustain his views would in our opinion as before expressed be to deny to the legislature under the present constitution any authority to enact any local or special law, for we cannot imagine any case where a general law could not be so framed as to apply to any given subject.

We are asked to adopt the reasoning in the case of *Thomas v. Commissioners of Clay County*, 5 Ind. 4, which is directly in point in favor of appellant; so are the decisions cited from Iowa under a constitution similar to ours. The Clay County case has been correctly interpreted and sufficiently explained in the former decisions of *Clarke v. Irwin*, 5 Nev. 124, and *Hess v. Pegg*, 7 Nev. 28. We consider the reasoning of the case unsound. The supreme court of Indiana expressly overruled it in *Gentile v. State*, *supra*. In *State v. Johnson*, *supra*, Ewing, C. J., said in regard to it, "we are not convinced by the reasoning, nor satisfied with the conclusion of that authority."

The courts in Iowa have so far followed the opinion in 5th Ind., but have added nothing to its reasoning. True in *Ex parte Pritz*, 9 Iowa, 36, after stating that a general law is

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applicable, the court say: "But finally a speculation upon this last proposition is unnecessary, for a general law upon this subject has been passed and thus all room for doubt is removed. * * * A general law being passed, the question of the practicability of passing such a law is no longer an open one." This is quoted by appellant as conclusive of this case, because a general law upon the subject of locating county seats has been passed in this State. Stats. 1867, 78. All that the authority in Iowa decides is that a general law has been passed; but it by no means follows that because a general law has been passed upon the subject of locating county seats, such law is applicable to every county in the state.

In *Sears v. Cottrell*, Christiancy, J., said: "No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown." 5 Mich. 259; see also, *Twitchell v. Blodgett*, 13 Mich. 150. In *Ogden v. Saunders*, Washington, J., said: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity." 12 Wheat, 270.

Judge Cooley says: "The constitutionality of a law then is to be presumed; because the legislature, which was first required to pass upon the question, acting as they must be deemed to have acted with integrity and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must therefore be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion as one based upon their best judgment." Cooley's Const. Lim. 183.

We are therefore inclined to the opinion that by the passage of the "Act to remove the county seat of Humboldt County," the presumption arises that the general law upon the statutes of this State was not applicable to Humboldt County. This was the judgment of the legislature and in the absence of any affirmative showing to the contrary the law should be upheld. Such was the decision in *Hess v. Pegg*, *supra*, which was a case on all fours with the one under consideration. We consider *Hess v. Pegg* conclusive of this case and should have been content to announce our judgment upon the authority of that case. But inasmuch as the principle involved is one of great importance and as the question has been argued with much earnestness and ability by respective counsel we thought it best to consider all the issues discussed and express our views in regard thereto, so as to avoid if possible any misapprehension hereafter.

The fact that the subject of the removal of county seats is general is admitted by respondents, and we do not understand them as denying the proposition that in some of the counties the general law might be applicable. The real question is whether at the time of the passage of the law under consideration it was applicable to the removal of the county seat of Humboldt County—not from Unionville to Winnemucca, for appellant of course admitted that no general law could accomplish that purpose.

In what respect then does this case differ from *Hess v. Pegg*? The fact that there are public buildings at Unionville and none at Winnemucca; that the county commissioners have not provided offices at Winnemucca; that Unionville is accessible to all parts of the county or that the plaintiff's taxes will be increased or decreased or himself or others be damaged, might have been proper questions to have submitted to the consideration of the legislative and executive departments in determining the expediency of the law, but in no wise prove or tend to prove whether or not a general law for removal of county seats was applicable to Humboldt County, which is the only question for us to con-

sider. Neither does the fact that a general law has been passed prove that it was applicable. Undoubtedly the presumption existed when the general law was passed that it was, and would be, applicable to every county in the State; but that presumption is met and overcome by the passage of the law under consideration, declaring, as in effect it certainly does that the general law is not applicable to this particular county.

The fact that under the general law the county seat of Humboldt County in 1869 was located at Unionville, or that the county seat of Churchill County was removed from La Plata to Stillwater only proves that the general law did accomplish the purpose and was at that time applicable to those counties, and does not establish nor tend to establish the fact that the general law is at present applicable, as contended for by appellant. In 1867 the county seat of Nye County was located at Belmont by a special law. Stats. 1867, 47. In 1871 a special act was passed providing for an election to locate the county seat in Lincoln County and also an act temporarily locating the county seat at Pioche. Stats. 1871, 64. Now, upon the reasoning of appellant, this might prove that the general law was not applicable to the removal of county seats; but we do not think that it proves anything except that the presumption arises that the general law was not applicable, else the special laws would not have been passed. The fact that a general law existed in California only proves (if it proves anything) that such a law was applicable to that state.

We have so far considered the case upon its merits. Appellant contends that sections 2, 3 and 4 of the act of 1873 are unconstitutional, and for that reason claims the law should not be upheld. We deem it unnecessary to notice specifically the several objections made by counsel, because in our judgment section 1 is valid and complete within itself.

The constitution (Art. XV, Sec. 7) provides that: "All county officers shall hold their offices at the county seat of their respective counties." Under this provision it would have been the duty of the county officers to remove from

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Unionville to Winnemucca on the first day of May, 1873, even if section 2 had not been incorporated in the act. So far as the sale of the real estate and immovable property provided for in section 3 is concerned, sufficient authority therefor is given to the commissioners in the first, eighth and eleventh subdivisions of the law of 1871. Stats. 1871, 47. And in the absence of any special provision to that effect, it would be the duty of the board of county commissioners to provide for the safe removal of the archives and other movable property of said county. This avoids section 3. Under section 1 (Stats. 1871, 47), it is made the duty of the commissioners "to cause to be erected and furnished a court-house, jail and such other public buildings as may be necessary." There was not, therefore, any absolute necessity for incorporating either section one, two, three or four into the act.

It is well settled that when part of a statute is unconstitutional, that will not authorize the court to declare the remainder of the statute void unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed one without the other. *Cooley's Const. Lim.* 177; *Commonwealth v. Hitchings*, 5 Gray, 485; *State of Nevada v. Eastabrook*, 3 Nev. 180; *Mayor of Hagerstown v. Dechert*, 32 Md. 384; *Santo et al v. State*, 2 Iowa, 187; *Robinson v. Bidwell*, 22 Cal. 386.

The true test of the constitutionality of such laws is thus expressed by Judge Cooley: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed wholly independent of that which was rejected, it must be sustained." Applying these rules to the act under consideration, we are convinced that the law must be upheld even if we concede that sections 2, 3 and 4 are unconstitutional. But we are unwilling to give our assent to the views maintained by appellant that section 2 is in violation of article XV, section 7 of the constitution because it requires the county officers to remove to Winne-

muca "on the week next preceding the said first day of May, 1873." Admitting, as claimed by appellant, that the word "week" as often used refers to a period of seven days, ending at Saturday night, 12 o'clock, still there are many exceptions to such a meaning of the word. When a person declares his intention to perform some act within one week he means within a period of seven days. When we speak of things that transpired within a week we mean within seven days. When the law says that a notice shall be published in a newspaper once a week for four successive weeks or for a period of three months, the authorities cited by appellant hold that the word "week" means "a particular period of time commencing immediately after 12 o'clock Saturday night and ending at 12 o'clock Saturday night seven days thereafter." While the language "week preceding" may be susceptible of the meaning claimed for it by appellant and might be so construed in certain cases, yet it is evident that such was not the meaning intended by the legislature in this particular act, and it is this intent that must govern in the construction of words used in the statute. "No statute or law should receive such a construction as will lead to absurd consequences." Respect for the framers will always induce courts, when a particular sense applied to a word will lead to such consequences, to infer that such was not the sense in which it was used. Smith's Com. 425, Sec. 281; Dwarrris on Stat. and Const. 676; Cooley's Const. Lim. 59; *McCullough v. State of Maryland*, 4 Curtis, 414; *State v. Clark*, 29 N. J. 99. The object of section 2 was to require the presence of the officers at Winnemucca "on the first day of May, 1873," and the idea was that it might take a week to remove and that the removal should take place within the seven days prior to the first day of May. But viewed in any light, the objection to this section as well as to sections 3 and 4 is probably too technical to merit as much consideration as we have given it.

It is not a light thing to set aside an act of the legislature, even when the objections to its validity are grave and weighty; but when they touch not the substance of the law

but are merely criticisms upon its form or phraseology, the exercise of such a power by the judiciary of the State would be prolific of evil, and would soon be universally condemned. 5 Sand. 16.

It is alleged in the complaint that "said act (Stats. 73, 59) is a special law in a case where a general law of uniform operation throughout the State exists and can be made applicable;" and this allegation not being denied in the answer, appellant claims, must be taken as confessed—"determined by the pleadings." In our opinion the allegation states merely a conclusion of law, and should not have been inserted in the complaint, and the defendants were not required to answer it. Conclusions of law should never be alleged. The law only requires the pleader to set out the facts from which the conclusion of the law is to be drawn. This rule we think is so well settled as not to require any argument or citation of authorities to sustain it.

In conclusion, we again repeat that in our opinion there is nothing to distinguish this case from *Hess v. Pegg*; and if we had any doubt as to the correctness of that decision we should nevertheless be inclined to sustain it, because it is an almost universal rule in construing statutes and constitutions to adhere to former decisions. *Seale v. Mitchell & Wardwell*, 5 Cal. 403; *State v. Thompson*, 10 La. 123; *Nelson v. Allen and Harris*, 1 Yerger, 377; *Sedgwick on Const. Law*, 254, and authorities there cited.

The order of the district court denying an injunction is affirmed.

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PATRICK BOYLAN, RESPONDENT, *v.* H. HUGUET *et als.*,
APPELLANTS.

TROVER FOR MINING STOCK AGAINST ASSIGNEES FOR BENEFIT OF CREDITORS.

Where a mining stock broker failed and assigned all his property for the benefit of his creditors; but one of them, for whom he had purchased stock in certain companies, declined to accept the assignment and demanded stock in such companies then held by the assignees, and upon their refusal to deliver brought trover as for a conversion: *Held*, that the fact that the assignees did not have sufficient of such stock to fill all the broker's contracts therefor could not be urged as a valid objection to a recovery.

MINING STOCK TRANSACTIONS—BROKERS NEED NOT DELIVER IDENTICAL STOCK PURCHASED. In the ordinary transactions between principals and brokers, principals are not entitled to receive the identical shares of stock purchased on their order, and brokers are within the terms of their contracts so long as they are prepared to deliver on payment and demand certificates representing the requisite number of shares.

PROPERTY IN MINING STOCK, WHAT. There is no special value or property in any particular share of mining stock, as distinguished from any other share, unless issued in the name of a party and charged to him upon the books of the company.

TROVER—MEASURE OF DAMAGES. The damages awarded in the action of trover should be all such and only such as necessarily flow from the wrongful act; that is to say, the value of the property at the time of conversion (for that is what one has found and the other lost), together with damages for the detention of that value (which is interest from conversion to judgment), and in addition any special damage which may legitimately arise out of matters in existence at the date of the tort.

CONVERSION OF MINING STOCK—"HIGHEST MARKET PRICE" NOT TRUE RULE OF DAMAGES. Where a judgment in trover for the conversion of mining stock was for the highest market price of the stock between the conversion and the trial, and far exceeded the market price at the time of conversion and interest, and no special damage was shown: *Held*, that the judgment proceeded upon a wrong theory of the measure of damages and that it should be reversed.

¹ APPEAL from the District Court of the First Judicial District, Storey County.

It appears that Boylan, the plaintiff, on or about June 2, 1870, requested H. H. Flagg, a broker of Gold Hill, to purchase for him ten shares of stock in the Savage Mining Company. Flagg made the purchase and entered it on his books to the credit of Boylan. Afterwards various transactions in mining stocks took place between them, until on or about

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February 2, 1872, when Flagg's books showed that he held to the credit of Boylan thirty shares of Savage stock, thirty shares of stock in the Alpha Mining Company, and that Boylan had paid up all that he owed Flagg. On February 3, 1872, Flagg failed, and in a day or two afterwards made an assignment of all the mining stocks held by him to the defendants, H. Huguet, William N. Hall, Wilson Dunlap, Samuel W. Chubbuck and R. J. Butler, as assignees for the benefit of his creditors. Among other stocks so assigned and delivered to the defendants were eighty-nine shares of Savage and one hundred and forty-four shares of Alpha; but all that Flagg had and all his assignees ever received fell far short of being sufficient to fill all his contracts.

On February 26, 1872, Boylan demanded of the assignees thirty shares of Savage and thirty shares of Alpha stock, claiming the same to be his own property, received by them from Flagg; and upon and for their refusal to deliver the same he commenced an action of trover against them, laying his damages at \$8130. This amount he recovered; but upon defendants making a motion for a new trial, he confessed error, allowed the motion to be granted and thereupon dismissed the action, and on June 20, 1872, commenced this second action, laying his damages at \$28,950, as stated in the opinion. The reason of this great difference in the amount of damages claimed appears to have been a great rise in the market price of stocks after the commencement of the first suit. On February 26, 1872, the time of the conversion, the market price of Savage was \$216 per share and of Alpha \$31 per share. In April following these stocks reached the highest price at any time attained between the time of conversion and trial of this, the second suit; that of Savage being \$650 and that of Alpha \$185 per share. It was upon the basis of these latter named prices that the court below assessed the damages and rendered judgment in favor of plaintiff for \$25,050. Defendants moved for a new trial, which was denied; and they then appealed from the judgment and order.

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Williams & Bisler, for Appellants.

I. A consideration of all the facts relating to the transactions between the parties justifies us in putting the case upon the footing of a bare agreement on the part of Flagg to deliver to respondent, on demand and payment, thirty shares of Savage stock. The agreement belonged to that class of contracts known as "executory contracts." Had Flagg been put into bankruptcy on February 3, 1872, all the stocks in his possession would have gone to his assignee, and it is clear that plaintiff would not have been allowed thirty shares of Savage to the exclusion of all the other claimants against Flagg of that stock; and yet such must have been the case if title thereto had absolutely vested in him prior to that time. We think therefore that we are justified both by reason and authority in urging that the contract between plaintiff and Flagg was merely executory, and hence that plaintiff could not maintain trover against Flagg, much less against these defendants. His remedy against Flagg, after payment, demand and failure to deliver the stock, was either for specific performance of the contract or damages for its violation.

II. Defendants did not wrongfully take, nor did they detain or convert, any property which the plaintiff showed himself entitled to. Flagg was lawfully in possession of the property delivered to defendants, and they received it upon an agreement with him and his creditors that they would appropriate the same for the benefit of all his creditors. Had they, without identification of property, delivered to plaintiff thirty shares of Savage or Alpha stock, they would have committed a wrong against the other creditors for which they would have been held liable at their suit. Upon what principle of right, justice or law can it be said that plaintiff was any more entitled to the stock received by defendants than the other claimants of Savage stock?

III. Upon the oral argument it was suggested by counsel for plaintiff that there might have been a difference between the relations of Flagg to his customers who paid in full and

those who had made only part payment on stocks purchased for them. In that suggestion they are not sustained by their leading case, *Markham v. Jaudon*, 41 N. Y. 235, nor any other authority which we have been able to find; and we beg to suggest that it is not founded in sound logic. We think the court below was led into holding plaintiff the owner of the stock alleged to have been converted by an erroneous application of the cases which hold that there is no difference between stocks of the same denomination, and that a seller may comply with a contract of sale by delivering any certificates of the particular stock agreed to be delivered which satisfy the amount. It seems to have concluded that the right of selection by the seller of stock to be delivered, confers upon the purchaser a corresponding right of selecting what he will take. We think the proposition too clearly untenable to require discussion.

IV. Though it may be said that the law concerning the measure of damages in actions of trover for the conversion of property of fluctuating value is unsettled, especially as to the time at which the value of the property converted is to be estimated, all the authorities seem to agree that the end generally to be attained is to compensate the owner of the property, in money, for the injury done him by the wrongful conversion—in other words, to put him as near as may be in as good condition as he would have been had his property not been taken. Damages are limited to compensation except in those cases where exemplary damages are, for some special cause, assessed as a punishment to the wrong doer, or to prevent him making profit by his wrongs. It would seem that the value of the thing taken, added to the value of its use between the time of the conversion and judgment, ought generally to compensate the owner, and, except in special cases not arising in the ordinary course of business, that such should be the rule of the measure of damages.

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Lewis & Deal, also for Appellants.

The measure of damage allowed in this case was the highest market price of the stock between the time of conversion and the day of trial, without the least showing or particle of evidence that the plaintiff would have realized that value, even if he had the stock in his possession; or in other words, without any proof whatever that he was really damaged to that extent. The rule so adopted has no sanction in legal principles and is only sustained by the decisions of three or four states; and they were rendered upon an entire misunderstanding of some English decisions of a comparatively recent date. The old rule which prevailed uniformly up to the decision of *West v. Wentworth*, 3 Cowen, 82, was that the current or market value of property at the time of conversion was the measure of damage, (*Amery v. Delamere*, 1 Strange, 505; *Fisher v. Prince*, 3 Burr. 136; *Gainsfield v. Carroll*, 2 B. & C. 624; *Startup v. Cortozzi*, 2 Crompt. M. & Roscoe, 165,) with perhaps this qualification, that if special damage could be proven it might be recovered in addition to the value of the article. But as is very clearly shown by Judge Duer in the case of *Suydam v. Jenkins*, 3 Sanford, 614, where all the English cases up to that time are elaborately and ably reviewed, in none of them was it held that the highest market value between the time of conversion and day of trial was the measure of damages, but only that the value at the time of trial might in some cases be so considered. But there is a material distinction between allowing the highest market value, as was done in this case, and the value at the time of trial. See *Fisher v. Prince*, 3 Burr. 136; and *Whitten v. Fuller*, 2 Bl. Rep. 902.

Now, so far as we have been able to ascertain, all the American cases supporting this rule are based upon the English cases referred to; but it being very clear that those cases do not sustain the proposition that the highest market value is the measure of damages, little or no weight should be given to them. If, however, they are entitled to consideration, the great weight of decision is the other way.

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Though New York, Connecticut, Iowa, Pennsylvania and California may support the rule, it appears from *Page v. Fowler*, 39 Cal. 420, that California is not satisfied, and from *Markham v. Jaudon*, 41 N. Y. 235, that several of the New York judges dissent from it. On the other hand we find in a limited examination many cases in which the rule is directly repudiated. See *Suydam v. Jenkins*, 3 Sanford, 604; *Smith v. Dunlap*, 12 Ill. 184; *The Railroad v. Pinkerton*, 42 N. H. 424; *Taylor v. Turner*, 2 Cranch C. C. Rep. 203; *Walker v. Borland*, 21 Mo. 289; *Hill v. Smith*, 32 Vt. 433; *Gray v. The Portland Bank*, 3 Mass. 364; *Sargent v. The Franklin Insurance Company*, 8 Pick. 90; *Startup v. Cartozzi*, 2 Crompt. Meeson and R. 163; *North American v. O'Meara*, 2 Nev. 113. See also, Sedgwick on Damages, 550, note; 2 Kent's Com. (8th Ed.) 480, note.

Mesick & Wood and R. H. Taylor, for Respondent.

I. The transaction between Boylan and Flagg was in no sense a sale of anything by Flagg to Boylan nor a purchase of anything by Flagg for himself, but was simply the execution by Flagg of Boylan's order to purchase for him and advance the purchase-money in whole or in part. Thus was created a debt on the part of Boylan to Flagg for commissions, expenses, money advanced for making the purchases and interest accruing, to secure the payment of which Flagg held the Savage stock so purchased together with the thirty shares of Alpha stock delivered to him by Boylan. The relations existing between them are correctly indicated in the opinion of Justice Hunt in the case of *Markham v. Jaudon*, 41 New York, 239.

II. The intangible nature of property in stocks and the impossibility of distinguishing one share from another would seem to render it impracticable to apply to this species of property the ordinary rules of identification. One share is the equivalent of another. Rights and obligations must be held to be reciprocal; and if a broker or pledgee may substitute an equivalent and be protected in the courts, why may

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not the pledgor or principal receive the benefit of the same doctrine? Why shall not the plaintiff here be entitled to claim as his own the shares found in the hands of Flagg's assignees, which they might have compelled him to accept as his own, had they chosen to deliver him the stock instead of withholding it?

III. The rule adopted by the district court in estimating damages prevails in England and in many of the United States. See *Markham v. Jaudon*, 41 N. Y. 234; *Romaine v. Van Allen*, 26 N. Y. 309; *Musgrave v. Beckendorff*, 53 Penn. St. 310; *Shepherd v. Johnson*, 2 East. 211; *Hamer v. Hathaway*, 33 Cal. 117; *Greening v. Wilkinson*, 1 Carr & P. 625; *Barrow v. Arnaud*, 8 Adol. & Ell. N. S. 595; *Archer v. Williams*, 2 Carr & Kir. 27; *West v. Pritchard*, 19 Conn. 212; *Adams v. Blodgett*, 47 N. H. 219; *Morgan v. Gregg*, 46 Barb. 184, 188; *Kortright v. Commercial Bank of Buffalo*, 20 Wend. 91; 22 Wend. 348; *Clark v. Pigney*, 7 Cow. 681; *Scott v. Rogers*, 31 N. Y. 683; *Burt v. Dutcher*, 34 N. Y. 493; *Douglas v. Kraft*, 9 Cal. 562.

IV. The injured party should be entitled to receive the amount he could have realized had he chosen to avail himself of the opportunity when the market was high and had he not been prevented by the act of the wrong-doer. There is no reason in saying that he might not have taken a notion to sell his property when it bore the highest price, and that therefore he should be limited to the market price existing at the time he was dispossessed and interest. It seems to us clear that any rule of damages by which the wrong-doer is made to pay more than the value of the property when it is first converted, whether in the shape of interest or money realized by a sale or otherwise, is founded upon the same principle as that which allows the highest fair market price at any date between the time when the owner is dispossessed and the trial.

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By the Court, WHITMAN, C. J.:

This action is trover, for the conversion of mining stock. Boylan, the respondent, dealt for a series of months with one Flagg, a broker of Gold Hill, Nevada, in the ordinary course of business. He gave orders which Flagg filled through his broker in San Francisco; and the purchases and sales as effected in the stock board there were reported to Boylan as the acts of Flagg. The former had no communication with the San Francisco broker; his account was kept entirely with Flagg and at the time of Flagg's failure was fully paid up, and thirty shares of the stock of the Savage Mining Company and a like number of the stock of the Alpha Mining Company stood to his credit upon Flagg's books. .

To the assignment for the benefit of his creditors, made by Flagg to appellants, respondent did not assent, but shortly thereafter notified them that he claimed the stocks before named; and on the twenty-sixth of February, 1872, he made formal demand therefor, upon refusal of which he commenced suit and recovered some eight thousand dollars. The appellants moved for a new trial; respondent confessed error, dismissed his suit and immediately instituted the present one, laying his damages at \$28,950, of which he recovered \$25,050.

At the time of the demand upon them, appellants held of the stocks assigned to them sufficient to satisfy respondent, though not enough to fill all Flagg's contracts; this is urged as an objection to respondent's recovery; but it is no element of this case, which has to do with its parties and not with strangers.

Appellants argue, first, that there should be no recovery; second, that if any the measure of damages should be different. The first point presents no difficulty, the second is more complicated. The transaction between Boylan and Flagg was one of every day occurrence, which is perfectly well understood by the community and is well defined at law, in which the parties occupied the mutually double positions,

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first of principal and agent, secondly of pledgor and pledgee. To make the first purchase Flagg acting as broker advanced money which was charged to his customer, while at the same time the stock bought was credited to his account, held however as a pledge for the moneys advanced, commissions charged and whatever other items went to make up the sum of indebtedness. Upon full payment thereof and demand therefor Boylan was entitled to the possession of the stock. All increase or decrease in value while so held was to his account; if sold the surplus proceeds were his, for it was his property from the moment of the purchase, subject to the lien before mentioned. This is clearly and conclusively the real position of the parties. It would seem self-evident; but let those who desire an elaboration of the matter see *Markham v. Jaudon*, 41 N. Y. 235.

It does not follow, however, that Boylan was entitled to receive the identical shares of stock purchased on his orders, if any were so specifically purchased: that was not the contract. Flagg, for the consideration of the market price of the stock, his commissions and other legitimate charges, agreed to buy for the respondent an interest in the Savage Mining Company equivalent to the number of shares ordered, and to deliver as evidence of that interest the certificates issued by the company to represent the same. It made no difference whether the certificate was number one or number one thousand, nor that he purchased number one and delivered number one thousand. So long as he held a certificate or certificates representing the requisite number of shares and was prepared to deliver them on payment and demand, so long was he within the terms of his contract; and though he might have used and re-used the identical certificates received on filling Boylan's orders, mixed them with others, destroyed them even, there was no conversion until he, or as in this case, his voluntary assignees refused to deliver upon demand; and so with the Alpha shares held as security. There is no special value or property in any particular share of stock, unless issued in the name of a party and to him charged upon the books of a company, which does not

appear to have been the fact in the present instance. Boylan's property and Flagg's charge were in so many shares, not in any particular shares.

Upon this refusal to deliver occurred the breach of contract, then the technical conversion. What should be the compensation for this wrong? From the general tenor of decisions in analogous cases it would seem in the absence of special cause of damage that the answer was clear: "The value of the property at time of breach of contract or conversion, with legal interest as damages for the detention of such value." The judgment herein was rendered upon a different theory, and was given for the highest market price between the conversion and the day of trial; and it is insisted by respondent that this is the rule with reference to property of fluctuating value.

That this is the rule in New York, subject to some meaningless exceptions, such as bringing suit within reasonable time, etc., there is no doubt. That some other states, notably Iowa, Pennsylvania and California, have substantially adopted this rule is true. Connecticut is sometimes ranked in the same line, but that is a mistake. *St. Peter's Church v. Beach*, 26 Conn. 356. California has endeavored to modify in some degree (*Page v. Fowler*, 39 Cal. 412), and New York shows its determination to recede, upon occasion made, in the following language of the entire court of appeals, by Church, Ch. J., pronouncing a recent opinion: "An unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, I am persuaded can not be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character. Without intending to discuss this question at this time, we deem it proper to say that while the decisions and opinions of our predecessors will receive the utmost respect and consideration, we do not regard the rule referred to so firmly settled by authority as to be beyond the reach of review, whenever an

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occasion shall render it necessary." *Matthews v. Coe*, 49 N. Y. 57. This is only dictum; but such dictum is very ominous of the fate of the New York rule.

It is not surprising that there is a desire to escape effects which are sometimes so absurd. As in this case, the first suit and recovery were for some eight thousand dollars: had that judgment stood, as it probably would have done but for the motion of appellants, the law would have declared that respondent was fully compensated for his loss consequent upon the wrong-doing of appellants; but that judgment having been set aside, it took over three times that amount to afford compensation only a few months after. In other words, damages were given which were purely speculative, which were not only not proven but which were against all probable presumption, as human experience teaches that the man who sells his stock at the highest price is the rare exception to the generality of dealers. Yet the measure was correct if the rule be so; the suit had been brought seasonably, and prosecuted with diligence.

Looking at the assumed basis of this rule it is impossible to add anything to the exhaustive *resumé* of the decisions said to constitute its foundation, as given in *Suydam v. Jenkins*, 3 Sand. 614; but it is curious and perhaps not uninteresting to re-glance at them for a moment. And first the stock cases so called, which were writs of inquiry to assess damages on bonds given to replace stock; and they hold that if the stock has risen in value since the day when it should have been delivered, the price at the time of trial is to be the measure of damages. *Shepherd v. Johnson*, 2 East. 211; *McArthur v. Seaforth*, 2 Taunt. 257; *Donner v. Buck*, 1 Stark. C. 318; *Hamun v. Hamun*, 1 C. & P. 413; *Owen v. Routte*, 14 C. B. 327. This upon the theory that the plaintiff wanted to keep his stock and therefore could only be indemnified by a verdict for money sufficient to replace it, as the defendant was bound to do. None of these cases hold, and *McArthur v. Seaforth* expressly negatives the idea that the highest price at any intermediate day can be allowed.

This rule was followed in this State in an equity case to

compel the transfer of certain shares of stock (*O'Meara v. North American Mining Company*, 2 Nev. 113) and is undoubtedly correct under similar circumstances either at law or in equity; but how it can justify the measure of damages allowed in this case is inexplicable; for here and in like cases courts never would allow the converted property to be restored in specie, except where it might be of such nature that its value could not have been changed; and the real question to be determined almost invariably is its worth, not that the party delinquent may replace it, as he would have been allowed to do in the cases cited, but that the injured party may be indemnified for its loss. When? Why when he lost it, not before nor after, but at the time when the loss occurred.

There are a few other decisions which seem to have been rendered rather upon the desire to do justice in the particular case than upon general principles and which are hardly precedents for anything. In *Greening v. Wilkinson*, 1 Carr & P. 625, trover for East India Company's warrants for cotton, the highest price either at time of conversion or subsequently, at jury's option, was given. Of this case Judge Duer says in *Suydam v. Jenkins*, *supra*: "It is, however, only a *nisi prius* decision, and the report is not only brief, but we apprehend imperfect; material facts seem to be omitted, nor is it stated what was the verdict finally rendered." That this is not the accepted rule appears from the uncontradicted remarks of counsel in *Elliott v. Hughes*, cited *post*. In *Archer v. Williams*, 2 Carr & Kir. 27, action for the wrongful detention of scrip, Creswell, J., directed the jury to find the highest price between conversion and trial: this direction they disobeyed; and finally, in making up a bill of exceptions, the instruction was considered to have been that more than nominal damages were to be allowed; so that case is not authority in point. In *Shaw v. Holland*, 15 M. & W. 145, an action for non-delivery of railway shares, the same rule was applied as in *Gainsford v. Carroll*, 2 B. & C. 624, for non-delivery of goods; *i. e.*, the difference between the contract price and the market price on the day when the contract

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was broken; making the distinction however, which is often found but which upon reflection will be seen to be none, that the money not having been paid it was in the power of the vendee to go into the market and buy and thus save himself, as if he was called upon to do so, and might not rely upon his contract. In *Mercer v. Jones*, 3 Camp. 477, Lord Ellenborough lays down the rule in trover, "that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion," and applying it to the case in hand (trover for bills of exchange), disallowed interest after demand and refusal to deliver. Of this case, Abbott, Ch. J., is reported to have said in *Greening v. Wilkinson*, that it was hardly law. Thus the wisest disagree.

In a recent case at *nisi prius* the highest price of goods between the agreed date of delivery and time of trial was given; and the case is worthy to be quoted somewhat lengthily, as presenting a comical instance of reasoning in a circle to make a rule. Remembering that the New York rule is fathered on English decisions, hear counsel. The action was for non-delivery of hops contracted at five pounds ten shillings the hundred weight; they had risen from the time of delivery to seven pounds ten shillings, at which price they continued till the day of trial. To the offer by plaintiff of evidence to that effect, "Joseph Brown (with whom was Shee, Sergt.) objected that such evidence was not admissible, as a series of cases had decided that the measure of damages for the non-delivery of goods purchased was the market price at the time of the breach of contract.

"McMahon (with whom was Digby Seymour) submitted that the rule applied only where the goods were not paid for at the time of the purchase, in which case it was said that the buyer not having parted with his money could go with it into the market and buy at the current price; but that a different rule prevailed where, as in the present case, the price was paid at the time of purchase. There was no case in which this precise point had been decided in the courts of this country, though there were several decisions upon it in the American courts. The nearest analogous cases in our

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courts were those relating to the loan of stock, in which it was decided that on the failure to return it the lender was entitled to recover the highest price up to the day of trial. * * * His lordship (Byles, J.) said * * * he would rule that the plaintiff was entitled to recover the value of the hops at the price of the present day, but would give the defendant leave to move to reduce the damages if the court should think he was wrong." *Elliott v. Hughes*, 3 F. & F. 387. No motion was made to reduce; so the case stands decided upon American authority, there being confessedly none English; while on the other hand the American cases claim English parentage.

The fact is, there is no such well established rule. There have been exceptional instances of granting this measure of damages, probably with the laudable desire of doing exact justice at the moment in an individual case. There has also been an attempt to make these exceptions the rule; but that has not prevailed, nor should it; for the purpose of the law is to make the nearest practicable approach to justice in all cases; and that can only be attained by the preservation of fundamental principles. What are they in cases like the one at bar? To that question there can be but one answer; all the authorities concur. Complete indemnity to the party injured, but no punishment to the wrong doer.

To accomplish this end all damages must be given which necessarily flow from the wrongful act. Those are the value of the property at the time of conversion, for that is what one has found and the other lost, together with damages for the detention of that value, which is legal interest from conversion to judgment, and in addition any special damage which may legitimately arise out of matters in existence at the date of the tort.

This rule does not militate against any former decision of this court, and agrees with its dicta in *O'Meara v. North Am. M. Co.*, 2 Nev. 113; *Prescott & Booth v. Wells, Furgo & Co.*, 3 Nev. 82; *Carlyon v. Lannan*, 4. Nev. 156; *Bowker v. Goodwin*, 7 Nev. 135. It dissents from the letter of a few American and English decisions—the former in their incipency

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shown in *Suydam v. Jenkins* to have been ill founded, while the latter are equally so. With the spirit and object of all authorities—complete indemnity to the injured party—it concurs; and it is believed it will prove to be productive of equal justice between litigants, giving indemnity while repressing speculation, enforcing restitution but repudiating punishment.

As the action of the district court was utterly at variance with the rule adopted, it follows that the case must be sent back. The order and judgment appealed from are reversed and cause remanded for a new trial.

SELDEN HETZEL, RELATOR, v. THE BOARD OF COUNTY COMMISSIONERS OF EUREKA COUNTY.

ACTION OF COUNTY COMMISSIONERS—NO CERTIORARI WHERE NO EXCESS OF JURISDICTION. Where the board of county commissioners of Eureka County entertained petitions for the holding of an election, as provided by the act creating such county (Stats. 1873, 107, Sec. 3), and after hearing evidence determined as a fact that the requisite number of *qualified* electors had not petitioned and thereupon refused to order an election: *Held*, that the action of such board was within its jurisdiction, and that therefore *certiorari* would not lie.

INQUIRY UPON CERTIORARI. If a board of county commissioners regularly pursue its authority and act within its jurisdiction, there can be no error in its action which can be reviewed upon *certiorari*.

This was an original proceeding in the Supreme Court. It was instituted by the relator suing out a writ of *certiorari* requiring the clerk of the board of county commissioners of Eureka County to certify up the proceedings of said board in reference to certain petitions which had been presented to it for calling an election of county officers as provided in the act creating Eureka County. (Stats. 1873, 107, Sec. 3). These petitions were the same to which reference is made in the case of *State ex rel. Hetzel v. Commissioners of Eureka County*, reported *ante*, 309. It appears from the record and return of the clerk that after the mandamus which was applied for in that case had been refused, the board of county

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commissioners proceeded to take further action upon the petitions presented; that it heard evidence in reference to the qualifications as electors of the signers thereof; that it determined as a board that the requisite number (five hundred) qualified electors had not signed, and that it thereupon refused to order an election.

Selden Hetzel, for Relator.

I. The proceeding by *certiorari* is the proper and only remedy of petitioner. Burrill's L. Dic. Art. Certiorari; *Stone v. Mayor, etc., of New York*, 25 Wend. 157; *People v. Supervisors of El Dorado*, 8 Cal. 58; *State ex rel. Hetzel v. Commissioners of Eureka County, ante*, 309; 1 U. S. Digest, Title, Certiorari.

II. The petitions presented were sufficient and the board of county commissioners should in response to them have ordered the election. The provision for such election was fully in accord with the spirit of our State fundamental law and with the genius of our republican institutions. In view of the premises the court should so modify the proceedings of the board as to require the calling of an election in response to the petitions on file and the performance of any and all other acts necessary to secure such election in accordance with the prayer of the petition herein.

G. W. Baker, with *Hupp, Hillhouse & Darrow*, for Respondents.

I. The inquiry on the present proceeding can not be pursued beyond an examination of jurisdictional facts. See *State ex rel. Mason v. County Commissioners of Ormsby County*, 7 Nev. 392; and *State ex rel. Fall v. County Commissioners of Humboldt County*, 6 Nev. 100. That the board had jurisdiction to act in the premises and that its acts partake of judicial character in determining whether or not a sufficient number of qualified electors had actually petitioned said board to call an election, is placed beyond controversy by the former decision of this Court upon the application on the part of relator for a mandamus. See *ante*, 309.

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II. It appears from the return that from the evidence before it the board arrived at the conclusion that five hundred qualified electors of Eureka County had not petitioned for such election to be held. How can this court determine whether that conclusion was not justified by the evidence? The oral testimony received by the board is not embraced in the record returned by the clerk, as it is not a matter of record in his office and not necessary to be presented in the minutes of the proceedings of the board (*Central Pacific R. Co. v. Board of Equalization of Placer County*, 32 Cal. 582); and without all the evidence before it this court is unable to arrive at any conclusion. But enough appears to show that the action of the commissioners in refusing to order said election was not in excess of their jurisdiction, and that such refusal was based upon the fact that the evidence of citizenship on the part of petitioners was not sufficient to justify them in making the order for such election.

By the Court, HAWLEY, J.:

In the act creating the County of Eureka, it is made the duty of the board of county commissioners to call an election to fill the various county offices on the first Monday in August, 1873, "*provided*, that five hundred or more of the qualified electors of the County of Eureka shall, on or before the first Monday in July, A. D. eighteen hundred and seventy-three, petition the board of county commissioners to order an election for county officers." Stats. 1873, 107, Sec. 3.

From the record before us, it appears that petitions containing over five hundred names were presented praying the board to order such election. It also appears that evidence was introduced before the board upon the question whether or not the petitioners were qualified electors of Eureka County. After the admission of evidence the commissioners find as a fact "that there is not now or never has been a petition or number of petitions before us containing the names of five hundred qualified electors of Eureka

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County asking for an election to be held." This finding is conclusive of the case and renders it unnecessary to examine the other points raised by counsel.

The writ of *certiorari* "shall be granted in all cases when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer," * * * Stats. 1869, 263, Sec. 436. "The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." Stats. 1869, 264, Sec. 442.

It was within the jurisdiction of the board to act upon the petitions and determine from the evidence before it whether or not the petitioners were "qualified electors of Eureka County." *State ex rel. Hetzel v. Commissioners, ante*, 309. "Whether its action was founded upon strictly legal or sufficient evidence, is not within the province of this court to inquire upon *certiorari*." *Fall v. The County Commissioners of Humboldt County*, 6 Nev. 103.

The board of county commissioners having regularly pursued its authority and acted within its jurisdiction, it follows that there was no error in its action. *Maynard v. Bailey*, 2 Nev. 314; *State ex rel. Mason v. Commissioners of Ormsby County*, 7 Nev. 398; *Coulter v. Stark*, 7 Cal. 245; *Comstock v. Clemens*, 19 Cal. 80; *People v. Dwinelle*, 29 Cal. 635; *People v. Johnson*, 30 Cal. 101; *People v. Elkins*, 40 Cal. 647.

The writ must therefore be dismissed. It is so ordered.

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3. ASSIGNMENT AFTER SUIT BROUGHT BY ASSIGNEE. Where mechanics' liens had been assigned and suit brought on them in the name of the assignee, and afterwards new and more formal assignments were made: *Held*, that the latter were irrelevant as evidence in the case, but that their admission was immaterial error, not affecting the decree. *Skyrme v. Occidental Mill and M. Co.*, 219.

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TROVER FOR MINING STOCK AGAINST ASSIGNEES' FOR BENEFIT OF CREDITORS. See MINES, 8.

ATTACHMENT.

1. ATTACHMENT SUIT—ORDER UPON DEFENDANT TO DELIVER UP STOCK. Where a defendant in an attachment suit was examined under section 131 of the Practice Act; and on its appearing that his only property subject to attachment consisted of mining stock which he had upon his person, the district judge ordered it to be delivered to the sheriff, to be held subject to the result of the suit: *Held*, that such order was not in excess of the jurisdiction of the district judge. *Bivins v. Harris*, 153.
2. CONSTRUCTION OF PRACTICE ACT, SEC. 131—EXTENT OF "EXAMINATION." The examination of the defendant, provided for in section 131 of the Practice Act, contemplates the examination of the defendant not only as a witness in a proceeding against a garnishee but in a direct proceeding against himself; and it authorizes a discovery of property concealed upon his own person and an application of it to his just debts. *Bivins v. Harris*, 153.

ATTORNEY.

ALLOWANCE BY COUNTY OF FEES OF "EXTRA COUNSEL," WHEN RATIFICATION OF UNAUTHORIZED EMPLOYMENT. See COUNTIES, 2.

POWER OF COUNTY COMMISSIONERS TO EMPLOY EXTRA COUNSEL. See COUNTY COMMISSIONERS, 1.

CLOSING ARGUMENT IN CAPITAL CASES. See CRIMINAL LAW, 12.

CONVERSATION OF ATTORNEY WITH JUROR, WHEN NOT PREJUDICIAL. See JURY, 2.

ATTORNEY SENDING FOR MEDICINE FOR JUROR WILL NOT VITIATE VERDICT. See JURY, 3.

BOND.

1. **LIABILITY ON OFFICIAL BOND OF APPOINTED DISTRICT ATTORNEY.** The sureties on the official bond of a person appointed to fill a vacancy in the office of district attorney, conditioned for faithful performance during incumbency, are liable for a breach at any time while such person fills the vacancy and until his successor is qualified. *State v. Wells*, 105.
2. **LIABILITY ON OFFICIAL BOND OF "DE FACTO" OFFICER.** The sureties on the official bond of a district attorney, conditioned for faithful performance during incumbency, are liable for his defalcations, though he hold office only *de facto*, and not *de jure*. *State v. Wells*, 105.
3. **INDEMNITY BOND AGAINST "LIABILITY."** To authorize a recovery upon a mere bond of indemnity, that is, a bond against damages, actual damage must be shown; but if the indemnity be not only against actual damage or expense but also against any *liability* for such damage or expense, a right of action is complete when the obligee becomes legally liable for damages. *Jones v. Childs*, 121.

ACTION OF INDEMNITY BOND AGAINST LIABILITY, WHAT TO BE SHOWN. See **EVIDENCE**, 5.

GOLD COIN JUDGMENT FOR LIABILITY ON INDEMNITY BOND. See **GOLD COIN**, 1.

BRIDGES.

[See **ROADS AND BRIDGES**.]

BROKERS.

MINING STOCK TRANSACTIONS—BROKERS NEED NOT DELIVER IDENTICAL STOCK PURCHASED. See **MINES**, 9.

CASES AFFIRMED.

VIRGINIA AND TRUCKEE R. R. Co. v. ELLIOTT, 5 NEV. 358, **AFFIRMED AS A FINALITY.** See **EMINENT DOMAIN**, 10.

CONTRACT BETWEEN PRE-EMPTIONERS—ROSE v. TREADWAY, 4 NEV. 455, **AFFIRMED AS FINALITY.** See **LAND**, 1.

CASE OVERRULED.

1. **SHERMAN v. DILLEY**, 3 NEV. 21, **CRITICIZED.** The opinion expressed in *Sherman v. Dilley*, 3 Nev. 21, that a judgment cannot be pleaded in bar or operate by way of estoppel while the case is pending on appeal, is rather dictum than decision. *Rogers v. Hatch*, 35.

CERTIFICATE.

DEPOSITIONS—CERTIFICATE OF COMMISSIONER TO HIS OWN OFFICIAL CHARACTER. See DEPOSITIONS, 2.

CERTIFICATE TO DEPOSITION TAKEN OUT OF STATE, WHAT TO CONTAIN. See DEPOSITIONS, 3.

CERTIORARI.

1. JUDGMENT ON APPEAL FROM JUSTICE FOR FORCIBLE ENTRY ANNULLED. As a justice of the peace has no jurisdiction of an action of forcible entry, a district court has no jurisdiction thereof on appeal; and its proceedings and judgment to the contrary will be annulled on *certiorari*. *Peacock v. Leonard*, 84.
2. JUDGMENT ROLL IN CERTIORARI CASES. In *certiorari* cases the judgment roll is preserved in the court granting the writ, as in a court of original jurisdiction in an ordinary action, and a copy only of the judgment is sent to the inferior tribunal. *Leonard v. Peacock*, 157.
3. CERTIORARI—NO AFFIRMATIVE ACTION AFTER PROCEEDINGS ANNULLED. If proceedings of an inferior court are annulled on *certiorari*, there is no further positive or affirmative action to be taken by the inferior tribunal. *Leonard v. Peacock*, 157.
4. NO CERTIORARI WHERE APPEAL. *Certiorari* does not lie where there is an appeal. *Leonard v. Peacock*, 157.
5. PROCEEDINGS ON CERTIORARI OF APPELLATE NATURE. Proceedings upon *certiorari* for the review of the action of an inferior tribunal are of appellate nature, though not pursued in the ordinary and technical form of appeal. *Peacock v. Leonard, on Motion*, 247.
6. INQUIRY UPON CERTIORARI. If a board of county commissioners regularly pursue its authority and act within its jurisdiction, there can be no error in its action which can be reviewed upon *certiorari*. *Helzel v. Eureka County Commissioners*, 359.

NO CERTIORARI WHERE NO EXCESS OF JURISDICTION. See COUNTY COMMISSIONERS, 3.

PROCEEDINGS OF DISTRICT COURT WITHOUT JURISDICTION UTTERLY VOID. See JURISDICTION, 2.

CHALLENGE.

CLERK'S MINUTES OF PEREMPTORY CHALLENGES NOT PART OF RECORD. See CRIMINAL LAW, 3.

CHARGE.

1. INSTRUCTION ON POINT NOT IN EVIDENCE PROPERLY REFUSED. An instruction, based upon an assumption of fact not sustained by any proof whatever, is properly refused; for the reason that no instruction can be properly given when there is no evidence to point or sustain it. *Fullon v. Day*, 80.
 2. INSTRUCTION NOT TO CONSIDER EXCLUDED EVIDENCE. An instruction warning the jury against the consideration of evidence, which has been offered but properly excluded, is perfectly proper. *McCoy v. Bateman*, 126.
 3. CRIMINAL LAW—CHARGE NOT PART OF RECORD. A charge given by the court of its own motion in a criminal case is not a part of the record, and can only be brought up on appeal by bill of exceptions. *State v. Forsha*, 137.
 4. PRESUMPTION IN FAVOR OF INSTRUCTIONS, WHERE EVIDENCE NOT APPEALED. Where the evidence in a criminal case is not taken up on appeal, an instruction will be presumed to have been warranted by and applicable to the proofs, unless appellant shows that it could not under any state of proof have been correct. *State v. Forsha*, 137.
 5. COURT'S OWN CHARGE IN CRIMINAL CASE NOT DEEMED EXCEPTED TO. The charge given by a court on its own motion in a criminal case cannot be considered on appeal, unless it be properly carried up by bill of exceptions. *State v. Burns*, 251.
 6. INSTRUCTION MUST APPLY TO CASE MADE BY EVIDENCE. Though an instruction asked by defendant in a criminal case and refused be good law, yet, if on appeal no evidence be carried up, the presumption will obtain that there was no evidence on which to base it and that its refusal was correct. *State v. Pierce*, 291.
 7. RIGHT OF COURT TO GIVE INSTRUCTIONS IN CRIMINAL CASES ON ITS OWN MOTION. That a court has a right to give instructions to the jury in a criminal case of its own motion, there can be no possible question. *State v. Pierce*, 291.
- CONSTRUCTION OF CRIMINAL PRACTICE ACT, SECS. 426 AND 450, AS TO CHARGES.
See CRIMINAL LAW, 1, 8.

COURT MAY INSTRUCT JURY IN CRIMINAL CASE ON ITS OWN MOTION. See CRIMINAL LAW, 9.

COMMISSIONERS.

COMMISSIONERS OF APPRAISAL. See EMINENT DOMAIN.

COMMISSIONERS OF COUNTY. See COUNTY COMMISSIONERS, 1.

COMMISSIONERS TO TAKE TESTIMONY OUT OF STATE. See DEPOSITIONS, 1.

CONDEMNATION.

[See EMINENT DOMAIN.]

CONSTITUTION.

1. CONSTRUCTION OF CONSTITUTION, ART. IV, SECS. 20 AND 21. Sections 20 and 21 of article IV of the constitution were intended to prohibit the legislature from passing any local or special law in any of the cases enumerated in section 20 and in all other cases where a general law would be applicable—that is, adapted to the wants of the people, suitable to the just purposes of legislation or to effect the object sought to be accomplished. *Evans v. Job*, 322.
2. CONSTITUTIONAL PROHIBITION AGAINST LOCAL AND SPECIAL LEGISLATION. The constitutional provisions prohibiting local and special legislation (Const. Art. IV, Secs. 20 and 21) recognize the fact that cases would arise in the ordinary course of legislation requiring local or special laws to be passed—cases where a general law might be applicable to the general subject but not applicable to the particular case. *Evans v. Job*, 322.
3. WHEN GENERAL LAWS SHOULD BE DEEMED “APPLICABLE.” A general law should always be construed to be “applicable” in the constitutional sense, where the entire people of the State have an interest in the subject, such as regulating interest, the statutes of frauds and limitations, etc. ; but where only a portion of the people are affected, as in locating a county seat, it will depend upon the facts and circumstances of each particular case whether such a law would be applicable. *Evans v. Job*, 322.

STATUTE UNCONSTITUTIONAL IN PART. See CONSTRUCTION, 8.

ACT FOR REMOVAL OF HUMBOLDT COUNTY SEAT CONSTITUTIONAL. See COUNTY SEATS, 1.

MEANING OF “JUST COMPENSATION” IN CONSTITUTION. See DEFINITIONS, 1.

JURISDICTION OF FORCIBLE ENTRY, ETC., UNDER CONSTITUTION. See FORCIBLE ENTRY AND DETAINER, 1.

NO OFFENSE OF “UNLAWFUL” AS DISTINCT FROM “FORCIBLE ENTRY.” See FORCIBLE ENTRY AND DETAINER, 3.

JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE FINAL. See JURISDICTION, 3.

NO STRICT RIGHT TO JURY TRIAL IN EQUITY CASE. See JURY, 5.

PRESUMPTION OF CONSTITUTIONALITY OF LOCAL OR SPECIAL LAW. See PRESUMPTIONS, 2.

. CONSTRUCTION.

1. LEGISLATIVE INTENT OF ACT TO TAX NET PROCEEDS OF MINES. In the passage of the act of February 28, 1871, for the taxation of the net proceeds of mines,

(Stats. 1871, 87) the legislative intent obviously was, first, to tax the gross yield less the actual cost; and, second, to limit a maximum, beyond which not even actual cost should be deducted: in other words, to exempt only the actual cost, provided it did not exceed sixty per cent. of the gross yield in case of ores worked by wet process, and sixty per cent., together with fifteen dollars per ton, in case of ores worked by dry process. *State v. Eureka Consolidated M. Co.*, 15.

2. **STATUTE OF TWO CONSTRUCTIONS.** When the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save it. *Virginia and Truckee R. R. Co. v. Henry*, 165.
3. **CONSTRUCTION OF MECHANICS' LIEN LAWS.** The new mechanics' lien law of 1871 (Stats. 1871, 123), which took effect simultaneously with the repeal of all former acts on the subject, was intended as a substitute therefor; but instead of entirely abrogating and annulling such prior laws it had the effect of continuing them in force so far as existing rights thereunder were concerned. *Skyrme v. Occidental Mill and M. Co.*, 219.
4. **STATUTORY CONSTRUCTION—PLAIN OBJECT OF LAW.** Where the object of the legislature is plain and the language unequivocal, effect should be given to the intent of the law-makers. *Fitch v. Elko County*, 271.
5. **NEW STATUTES APPLY TO NEW CASES.** New statutes apply only to new cases, unless the contrary expressly appears. *Fitch v. Elko County*, 271.
6. **ADMISSIO UNUS EXCLUSIO ALTERIUS.** The provision of the act of March 8, 1865, in reference to the construction of toll-roads that "all franchises granted for toll-roads by the first legislature of this State may be located under the provisions of this act" (Stats. 1864-5, 254, Sec. 9), excludes the location thereunder of franchises granted by any other legislature. *State ex rel. Boardman v. Lake*, 276.
7. **CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE.** When a statute has received a judicial construction and is afterwards adopted by another state, the construction as well as the terms of the statute will be deemed adopted. *State v. Robey*, 312.
8. **STATUTE GOOD IN PART AND BAD IN PART.** If, when an unconstitutional portion of a statute is stricken out, that which remains is complete in itself and capable of being executed wholly independent of that which was rejected, it must be sustained. *Evans v. Job*, 322.
9. **DOCTRINE OF STARE DECISIS.** It is an almost universal rule in construing statutes and constitutions to adhere to former decisions. *Evans v. Job*, 322.

CONSTRUCTION OF PRACTICE ACT, SEC. 131—EXTENT OF "EXAMINATION." See ATTACHMENT, 2.

CONSTRUCTION OF CONSTITUTION, ART. IV., SECS. 20 AND 21. See CONSTITUTION, 1.

CONSTITUTIONAL PROHIBITION AGAINST LOCAL AND SPECIAL LEGISLATION. See CONSTITUTION, 2, 3.

STATUTORY PROVISIONS AS TO TIME AND PLACE OF HOLDING COURT. See COURTS AND JUDGES, 1, 2.

STATUTORY CONTRACT OF DEDICATION BY ACCEPTANCE OF FRANCHISE. See DEDICATION, 1.

CONSTRUCTION OF QUITCLAIM DEED OF PUBLIC LAND. See DEED, 1.

CONSTRUCTION OF DEED OF LAND AND "ALSO PRIOR RIGHT TO USE" WATER. See DEED, 5.

CONSTRUCTION OF RAILROAD LAW AS TO FENCES. See FENCES, 1.

EFFECT OF NEW LAW ON OLD MECHANIC'S LIEN. See MECHANIC'S LIEN, 4.

MECHANIC'S LIEN LAW TO BE LIBERALLY CONSTRUED. See MECHANIC'S LIEN, 8.

CONTRACTS.

STATUTORY CONTRACT OF DEDICATION BY ACCEPTANCE OF FRANCHISE. See DEDICATION, 1.

ACTION FOR SPECIFIC PERFORMANCE—PREVIOUS DEMAND A MATTER OF COSTS. See DEMAND, 1.

RIGHT OF MARRIED WOMAN TO CONTRACT IN CASE OF ABANDONMENT. See HUSBAND AND WIFE, 1.

CONTRACTS BETWEEN PRE-EMPTIONERS. See LAND, 1.

MECHANIC'S LIEN FOR WORK DONE UNDER VARIOUS CONTRACTS. See MINES, 7.

MINING STOCK TRANSACTIONS—BROKERS NEED NOT DELIVER IDENTICAL STOCK PURCHASED. See MINES, 9.

CONVERSION.

MEASURE OF DAMAGES ON CONVERSION OF MINING STOCK. See DAMAGES, 4, 5.

COSTS.

1. OBJECTION ON APPEAL TO COST-BILL. An objection to a bill of costs can not be maintained on appeal, when the bill is not properly made a part of the record on appeal. *McFadden v. Ellsworth Mill and M. Co.*, 57.

2. **COSTS IN EQUITY—SPECIFIC PERFORMANCE CASES.** Costs in equity are in the discretion of the court; and if a plaintiff unreasonably enforce an equitable right, depriving defendant of an opportunity to satisfy the claim made against him without suit, the relief may be granted without costs or plaintiff may be compelled to pay defendant's costs. *Welland v. Huber*, 203.

ACTION FOR SPECIFIC PERFORMANCE—PREVIOUS DEMAND A MATTER OF COSTS.
See DEMAND, 1.

COUNTIES.

1. **ACTION AGAINST COUNTY IN OTHER JUDICIAL DISTRICT.** The statute prescribing the manner of commencing an action against a county and providing that it "may be commenced in the district court of the judicial district embracing said county," (Stats. 1864, 45) does not prevent the bringing of such an action in another judicial district, subject to the right of defendant to a change of venue. *Clarke v. Lyon County*, 181.
2. **ALLOWANCE BY COUNTY OF FEES OF "EXTRA COUNSEL," WHEN RATIFICATION OF UNAUTHORIZED EMPLOYMENT.** Where Clarke & Wells, having performed legal services for Lyon County under an unauthorized employment by the district attorney in a suit pending against it, presented their bill of \$5000 therefor to the county commissioners; and it appeared that such commissioners with a knowledge of all the material facts and after full discussion upon the merits deliberately recognized the performance of the services for the county and allowed \$400 as a fair compensation therefor: *Held*, that such action amounted to a ratification of the unauthorized employment by the district attorney, and that by such ratification the county became bound to pay what the services were reasonably worth. *Clarke v. Lyon County*, 181.

ASPORTATION OF STOLEN GOODS INTO ANOTHER COUNTY AN OFFENSE THEREIN.
See CRIMINAL LAW, 4, 5.

SHERIFF'S FEES IN DELINQUENT TAX SUITS, WHEN PAYABLE BY COUNTY. See SHERIFF, 1.

DELINQUENT TAX SUITS—WHEN FEES PAYABLE BY COUNTY. See TAXES, 7.

COUNTY COMMISSIONERS.

1. **POWER OF COUNTY COMMISSIONERS TO EMPLOY EXTRA COUNSEL.** The statute creating boards of county commissioners, in authorizing them "to control the prosecution and defense of all suits to which the county is a party," (Stats. 1864-5, 257, Sec. 8) confers upon them the power to employ counsel in such suits other than the district attorney, and as a consequence to ratify the act of an unauthorized agent in employing such counsel. *Clarke v. Lyon County*, 181.
2. **ORGANIZATION OF EUREKA COUNTY—ELECTION FOR COUNTY OFFICERS.** Under section 3 of the act for the organization of Eureka County (Stats. 1873, 107):

Held, that before an election for county officers could be ordered, it had to be ascertained that five hundred persons had petitioned therefor, and that such petitioners were qualified electors—which facts had to be determined by the county commissioners acting judicially. *State ex rel. Hetzel v. Eureka County Commissioners*, 309.

3. ACTION OF COUNTY COMMISSIONERS—NO CERTIORARI WHERE NO EXCESS OF JURISDICTION. Where the board of county commissioners of Eureka County entertained petitions for the holding of an election, as provided by the act creating such county (Stats. 1873, 107, Sec. 3), and after hearing evidence determined as a fact that the requisite number of *qualified* electors had not petitioned and thereupon refused to order an election: *Held*, that the action of such board was within its jurisdiction, and that therefore *certiorari* would not lie. *Hetzel v. Eureka County Commissioners*, 359.

INQUIRY UPON CERTIORARI OF PROCEEDINGS OF COUNTY COMMISSIONERS. See CERTIORARI, 6.

DELINQUENT TAX SUITS ORDERED BY COMMISSIONERS—FEES. See TAXES, 7.

COUNTY SEATS.

1. ACT FOR REMOVAL OF COUNTY SEAT OF HUMBOLDT COUNTY NOT UNCONSTITUTIONAL. The act of 1873 to remove the county seat of Humboldt County from Unionville to Winnemucca (Stats. 1873, 59) is not in violation of sections 20 and 21 of article IV of the constitution. *Evans v. Job*, 322.

COURTS AND JUDGES.

1. PROVISION TO PREVENT LOSS OF TERM. The purpose of section 52 of the act concerning courts and providing for adjournments (Stats. 1869, 136) is to prevent the loss of a term in case of the failure of the judge to attend on the first day of the term. *State v. Roberts*, 239.
2. TIME AND PLACE OF HOLDING COURTS—CERTAINTY. The intention of the legislature in prescribing the times for the commencement and the place for holding the terms of the district court is to attain certainty. *State v. Roberts*, 239.

JUDGMENT ON APPEAL FROM JUSTICE FOR FORCIBLE ENTRY ANNULLED. See CERTIORARI, 1.

INVALID CONVICTION EXCEPT AT LEGAL TERM OF COURT. See CRIMINAL LAW, 7.

JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE'S COURT. See JURISDICTION, 1, 3.

NO LEGAL TERM OF COURT EXCEPT AT TIME PRESCRIBED. See JURISDICTION, 5.

NO "UTAH TERRITORY JUDGE" IN NEVADA TERRITORY. See OFFICES AND OFFICERS, 2.

WRIT OF RESTITUTION, WHEN ISSUED BY SUPREME COURT. See PRACTICE, 2.

COVENANT.

[See WARRANTY.]

CRIMINAL LAW.

1. CRIMINAL PRACTICE ACT, SECS. 426 AND 450. Sections 426 and 450 of the Criminal Practice Act, providing that written charges presented or asked form part of the record, do not apply to a charge given by the court of its own motion—such charge not being presented or asked. *State v. Forsha*, 137.
2. CRIMINAL PRACTICE—TIME OF SETTLEMENT OF BILL OF EXCEPTIONS. Section 423 of the Criminal Practice Act, requiring bills of exception to be settled, signed and filed within ten days after trial, is directory; but if not so settled and signed within the time prescribed, some reasonable excuse should be given for the delay. *State v. Baker*, 141.
3. CLERK'S MINUTES OF PEREMPTORY CHALLENGES NOT PARTS OF RECORD. The Criminal Practice Act does not require the clerk to make any minutes of peremptory challenges; and if he does make such minutes, they will not be considered as parts of the record or reviewed on appeal, without a bill of exceptions. *State v. Baker*, 141.
4. LARCENY OF CATTLE STOLEN IN ONE COUNTY AND DRIVEN TO ANOTHER—VENUE. A person charged with larceny of cattle may be indicted and tried for the offense in any county through which he drove them, as well as in the county where they were stolen or into which they were driven. *State v. Brown*, 208.
5. ASPORTATION OF STOLEN GOODS INTO ANOTHER COUNTY AN OFFENSE THEREIN. A person stealing goods in one county and carrying them into other counties is considered guilty of the crime and may be indicted and convicted in any of such counties; because every act of the thief in the removal of the property and keeping it from the possession of the owner is, in contemplation of law, an offense. *State v. Brown*, 208.
6. CRIMINAL LAW—DECLARATION OF CO-DEFENDANT AFTER OFFENSE NOT EVIDENCE AGAINST OTHERS. On a trial of Ah Tom and others for grand larceny, where the State was permitted, under objection, to prove the declarations of Ah Tom, made several days after the larceny and not in the presence of his co-defendants, to the effect that he was innocent but he knew them to be guilty: Held, clearly error as against such co-defendants. *State v. Ah Tom*, 213.

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7. **NO VALID CONVICTION EXCEPT AT LEGAL TERM OF COURT.** Where a person was tried and found guilty of crime at a term of the district court, which was not authorized by statute: *Held*, that such conviction was void. *State v. Roberts*, 239.
 8. **WHAT INSTRUCTIONS IN CRIMINAL CASES MUST BE EXCEPTED TO.** Sections 386 and 387 of the Criminal Practice Act refer to two distinct classes of instructions; the former to those given by the court on its own motion; the latter to those asked by either party; and it is the latter only which are made by sections 426 and 450 a part of the record and deemed excepted to. *State v. Burns*, 251.
 9. **COURT MAY INSTRUCT JURY IN CRIMINAL CASE ON ITS OWN MOTION.** On the trial of a criminal case the court has authority to charge the jury on its own motion. *State v. Burns*, 251.
 10. **WHEN ACCUSED CANNOT COMPLAIN OF WRONG NAME.** Where a person was indicted by the name of Thomas Burns, and on arraignment gave his name as Thomas L. Burns, but after conviction moved for a new trial on the ground, supported by affidavit, that at the time of his arraignment he was ignorant he was improperly named in the indictment and that his true name was Thomas L. Byrne: *Held*, that he was sufficiently identified and had no good ground of complaint. *State v. Burns*, 251.
 11. **LARCENY OF ARTICLES SEVERED FROM FREEHOLD.** The taking and carrying away of articles, which formed a part of the freehold, will not constitute a larceny unless an interval of time has elapsed between the acts of severance and asportation; but it seems only such an interval is necessary as that the two acts shall not constitute one transaction. *State v. Berryman*, 262.
 12. **CLOSING ARGUMENT IN CAPITAL CASES.** Where the defendant in a capital trial was not allowed to close the argument to the jury; but it appeared that two counsel on each side argued the case and that they alternated, the prosecution having the close: *Held*, no error. *State v. Pierce*, 291.
 13. **POSTPONEMENT OF SENTENCE IN CASE OF ESCAPE—SENTENCE AT SUBSEQUENT TERM.** Where a defendant after conviction of murder in the second degree escaped and could not be produced on the day fixed for sentence, and sentence was thereupon postponed until such time as he could be produced; and being produced at a subsequent term he objected that at the expiration of the former term the court lost all jurisdiction of the cause and could not afterwards render any judgment: *Held*, that the objection was frivolous. *State v. Pierce*, 291.
 14. **TIME FOR SENTENCE.** The statutory requirement that a day be fixed for sentence is for the benefit of the convicted person; and if he by escape deprives himself thereof, he cannot complain of being sentenced at any day of any term of court thereafter. *State v. Pierce*, 291.
 15. **PROOF BEYOND REASONABLE DOUBT NOT REQUIRED TO ESTABLISH MITIGATORY CIRCUMSTANCES.** Where in a murder case the court instructed to the effect that if the jury found beyond a reasonable doubt that deceased inflicted upon defendant a serious and highly provoking injury, sufficient to excite an irresistible passion in a reasonable person, and that defendant, without any interval sufficient for the voice of reason and humanity to be heard, slew deceased, they should convict of manslaughter: *Held*, palpably and flagrantly erroneous. *State v. Pierce*, 291.

16. **SPIRIT OF CRIMINAL LAW.—RIGHTS OF ACCUSED PERSONS.** No technicality, except by the express letter of the law, should ever deprive an accused person of a substantial right. *State v. Pierce*, 291.
17. **APPEAL FROM ORDER SUSTAINING DEMURRER TO INDICTMENT—RECORD, HOW MADE.** The statute provides for an appeal from an order sustaining a demurrer to an indictment, but makes no provision for a record in such case (Stats. 1861, 485, Sec. 469): *Held*, that such record should be by bill of exceptions and that in the absence of such bill the appeal should be dismissed. *State v. Fellows*, 311.
18. **ASSAULT WITH DEADLY WEAPON, ETC., INCLUDED IN "ASSAULT WITH INTENT TO MURDER."** An indictment charging an assault with intent to commit murder will sustain a conviction of an assault with a deadly weapon with intent to inflict a bodily injury. *State v. Robey*, 312.

AMENDMENT, AFTER FILING, OF BILL OF EXCEPTIONS IN CRIMINAL CASE. See AMENDMENTS, 3.

REVERSAL OF CONVICTION FOR WANT OF COMPETENT EVIDENCE. See APPEAL, 13.

NO REVERSAL OF CONVICTION FOR ERROR WHERE NO PREJUDICE. See APPEAL, 14.

CHARGE GIVEN ON COURT'S OWN MOTION NOT PART OF RECORD. See CHARGE, 3.

RIGHT OF COURT TO GIVE INSTRUCTIONS ON ITS OWN MOTION. See CHARGE, 7.

WORDS "SILVER BEARING ORE" IN INDICTMENT FOR LARCENY IMPLY SEVERANCE FROM FREEHOLD. See DEFINITIONS, 3.

SUFFICIENCY OF INDICTMENT FOR LARCENY OF ORE. See INDICTMENT, 3.

SUPERFLUOUS MATTER IN INDICTMENT. See INDICTMENT, 4.

INDICTMENT FOR FELONIOUS ASSAULT—NON-ESSENTIALS. See INDICTMENT, 6.

CURRENCY.

[See GOLD COIN.]

DAMAGES.

1. **INTEREST AS DAMAGES IN REPLEVIN CASES.** In actions to recover personal property wrongly taken, interest from the time of taking may always be given as damages, without proof of special damage. *Blackie v. Cooney*, 41.

2. MEASURE OF DAMAGES ON BREACH OF WARRANTY OF TITLE. In case of a breach of warranty of title of real estate, where there has been no fraud or concealment, the measure of damages is the value of the property at the time of sale, to be ascertained by the purchase-money, with interest thereon and the costs expended in defense of the title; and when the eviction is partial, the damages will be apportioned to the measure of value between the property lost and the property preserved. *Dalton v. Bowker*, 190.
3. DAMAGES ON WARRANTY, FOR EVICTION—"PRESENT VALUE" NOT RELEVANT. In a suit for breach of warranty of title, an instruction which directs the jury to consider the value of the property lost at the time of trial as the measure of damages, is error. *Dalton v. Bowker*, 190.
4. TROVER—MEASURE OF DAMAGES. The damages awarded in the action of trover should be all such and only such as necessarily flow from the wrongful act; that is to say, the value of the property at the time of conversion (for that is what one has found and the other lost), together with damages for the detention of that value (which is interest from conversion to judgment), and in addition any special damage which may legitimately arise out of matters in existence at the date of the tort. *Boylan v. Huguet*, 345.
5. CONVERSION OF MINING STOCK—"HIGHEST MARKET PRICE" NOT TRUE RULE OF DAMAGES. Where a judgment in trover for the conversion of mining stock was for the highest market price of the stock between the conversion and the trial, and far exceeded the market price at the time of conversion and interest, and no special damage was shown: *Held*, that the judgment proceeded upon a wrong theory of the measure of damages and that it should be reversed. *Boylan v. Huguet*, 345.

LIABILITY FOR DAMAGES ON INDEMNITY BOND AGAINST "LIABILITY." See BOND, 8.

DAMAGES ON CONDEMNATION OF LAND FOR RAILROAD PURPOSES. See EMINENT DOMAIN, 2, 3, 4, 5, 8, 10.

APPRAISAL OF LAND TAKEN FOR RAILROAD AFTER ORIGINAL CONSTRUCTION. See RAILROADS, 2.

CONDEMNATION OF LAND FOR RAILROADS—"DAMAGES TO RESIDUE OF PREMISES." See RAILROADS, 6.

DEDICATION.

1. STATUTORY CONTRACT OF DEDICATION BY ACCEPTANCE OF FRANCHISE. The act of December 17, 1862, granting a toll-road franchise to Myron Lake (Stats. 1862, 19) and Lake's acceptance thereof, amounted to a solemn dedication by him, by way of statutory contract, of claims to any greater easement. *State ex rel. Boardman v. Lake*, 276.

DEED.

1. **EFFECT OF QUITCLAIM DEED OF PUBLIC LAND.** Though courts have gone a long way to sustain equities where any contract or trust existed in regard to pre-emption claims, none has gone so far as to hold that a quitclaim deed by a person, who afterwards pre-empted and obtains a patent, conveys all the right, title, and interest in and to the land deeded, present and prospective; especially when the pre-emption claim had no existence at the date of the deed. *Harden v. Cullins*, 49.
2. **QUITCLAIM DEED AFFECTS ONLY PRESENT RIGHT.** A quitclaim deed can operate only as a release of what title or right the vendor had in the land at its date. *Harden v. Cullins*, 49.
3. **BARGAIN AND SALE DEED—OPERATION OF STATUTE OF USES.** When a person bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant and therefore void in law; but, though not a use which the statute can execute, yet still it is a trust in equity which in conscience ought to be performed. *Phillipotts v. Blasdel*, 61.
4. **DEED DIRECT TO LOANER OF PURCHASE-MONEY AS SECURITY.** If a person loans money to another on the security of a lot to be purchased and takes the deed in his own name to hold as security for the loan, such transaction constitutes a mortgage between them, the same as if the borrower had taken the deed and then made a mortgage to the loaner. *Leahigh v. White*, 147.
5. **CONSTRUCTION OF DEED OF LAND "AND ALSO PRIOR RIGHT TO USE" WATER.** Where a deed conveyed a tract of land "and also the prior right to use for irrigation and other farming purposes the one-half of the waters of Thomas Creek, the natural channel of which is situate in and through the above described land," and warranted "the title to said land and the use of said water": *Held*, that the water right warranted was not the mere right of a riparian owner, which would have passed by a deed of the land; but that the language employed and the use of the word "also" meant something in addition to the land and its incidents. *Dalton v. Bowker*, 190.
6. **CONVEYANCE BY ABANDONED WIFE, HUSBAND MUST JOIN.** The right of married women to alienate land in this State, whether their separate estate or community property, does not depend upon the common law, but upon our statutes; so that a wife's deed or mortgage, without her husband's joining in it, though he has abandoned her for years, is inoperative and void. *Beckman v. Stanley*, 257.

MEANING OF WORD "ALSO" IN DEED. See DEFINITIONS, 2.

SALE OF MINE BY ANOTHER THAN USUAL NAME. See MINES, 2, 5.

EFFECT OF DEED UNDER CONGRESSIONAL TOWN-SITE ACT. See TOWN-SITE, 1.

DEFAULT.

1. **"DEFAULT" NOT NECESSARY TO SUPPORT JUDGMENT AFTER DEMURRER OVER-ruled.** Where a demurrer to a complaint has been overruled an entry of default is not a prerequisite to the rendition of judgment. *Winter v. Winter*, 129.

DEFINITIONS.

1. MEANING OF "JUST COMPENSATION." The word "just" in the constitutional provision that private property shall not be taken for public use without "just compensation" (Const. Art. I, Sec. 8) is used evidently to intensify the meaning of the word "compensation"—to convey the idea that the equivalent to be rendered shall be real, substantial, full and ample. *Virginia and Truckee R. R. Co. v. Henry*, 165.
2. MEANING OF WORD "ALSO" IN DEED. The word "also" as used in a deed granting specific land "and also" a right which is not necessarily an incident of such land, implies something in addition to the land. *Dalton v. Bowker*, 190.
3. WORDS "SILVER BEARING ORE" IMPLY SEVERANCE FROM FREEHOLD. The words "silver bearing ore," as used in an indictment charging grand larceny of it, mean a portion of vein matter, which has been extracted and separated from the mass of waste rock and earth, and imply severance from the freehold. *State v. Berryman*, 262.
4. MEANING OF WORD "WEEK." The word "week" in the provision of the act of 1873 for the removal of the county seat of Humboldt County that all the offices shall be removed to Winnemucca "on the week next preceding May 1, 1873" (Stats. 1873, 59, Sec. 2), does not mean the week ending at 12 o'clock on Saturday night but the seven days prior to May 1, 1873. *Evans v. Job*, 322.

INDEMNITY BOND AGAINST "LIABILITY." See BOND, 3.

WHEN GENERAL LAWS TO BE DEEMED "APPLICABLE." See CONSTITUTION, 1, 3.

"COMPENSATION FOR LAND TAKEN" IS NOT MERE MARKET VALUE. See EMINENT DOMAIN, 3.

NO OFFENSE OF "UNLAWFUL," AS DISTINCT FROM "FORCIBLE" ENTRY. See FORCIBLE ENTRY AND DETAINER, 3.

"OFFICER DE FACTO"—REQUISITES. See OFFICES AND OFFICERS, 3.

"GOOD CAUSE," TO SET ASIDE COMMISSIONERS' REPORT. See RAILROADS, 7.

TOLL ROAD A "ROAD IN GENERAL USE BY TRAVELING PUBLIC." See ROADS AND BRIDGES, 3.

MEANING OF "MANNER," IN STATUTE TAXING PROCEEDS OF MINES. See TAXES, 6.

MEANING OF "REPRESENTATIVE OF DECEASED PERSON," IN PRACTICE ACT, SEC. 379. See WITNESS, 1.

DEMAND.

1. ACTION FOR SPECIFIC PERFORMANCE—PREVIOUS DEMAND A MATTER OF COSTS. Where a person has a right to a specific performance, such right depending upon

the contract and not upon a breach of it, a demand of performance before suit brought is only important in reference to the costs of the action and has no bearing upon the merits or rights of the parties. *Welland v. Huber*, 203.

DEMURRER.

TECHNICAL DEFECTS OF PLEADING SHOULD BE POINTED OUT BY DEMURRER. See AMENDMENTS, 2.

APPEAL FROM ORDER SUSTAINING DEMURRER TO INDICTMENT—RECORD, HOW MADE. See CRIMINAL LAW, 17.

"DEFAULT" NOT NECESSARY TO SUPPORT JUDGMENT AFTER DEMURRER OVERRULED. See DEFAULT, 1.

OBJECTIONS TO DEFECTIVE PLEADING, WHEN AND HOW TO BE TAKEN. See PLEADING, 3.

ALLEGATIONS BY WAY OF RECITAL—GENERAL DEMURRER INSUFFICIENT. See PLEADING, 4.

RIGHT TO ANSWER AFTER DEMURRER OVERRULED NOT ABSOLUTE. See PRACTICE, 1.

DEPOSITION.

1. EFFECT OF STIPULATION TO TAKE DEPOSITION AS ADMISSION. Where it was stipulated that certain depositions "may be taken before L. P. Fisher, a justice of the peace at Woodstock, in the county of Carleton, in the province of New Brunswick": *Held*, that the stipulation was a concession that there was a person named L. P. Fisher, occupying the official position of justice of the peace at the place mentioned, and was an agreement, under the statute, upon that person to take the deposition. *Blackie v. Cooney*, 41.
2. DEPOSITIONS—CERTIFICATE OF COMMISSIONER TO HIS OWN OFFICIAL CHARACTER. As the statute in reference to depositions out of the State, (Practice Act, Secs. 412, 414) provides no method of identification of the official character of the person appointed to take them, such person, whether judge, justice of the peace, or commissioner, becomes for the purpose the officer of the court issuing the commission; and his certificate of his own character must be deemed to show *prima facie* that he is the person designated. *Blackie v. Cooney*, 41.
3. CERTIFICATE TO DEPOSITION TAKEN OUT OF THE STATE, WHAT TO CONTAIN. Where it was objected to a deposition taken out of the State that the statement, that the deposition was read over to the witness before signing, was interlined in the certificate and in a different ink from the body of it: *Held*, that the interlineations were of nothing material, as the statute did not prescribe any form of certificate nor require any matter to be specifically set forth, except that the commissioner had administered an oath and taken the deposition in answer to the interrogatories, or, when the examination was without interrogatories, in respect to the question in dispute. *Blackie v. Cooney*, 41.

.DISTRICT ATTORNEY.

1. **TERM OF DISTRICT ATTORNEY HOLDING BY APPOINTMENT.** The provision of the act of March 11, 1865, to the effect that a vacancy in the office of district attorney shall be filled by appointment for the "balance of the unexpired term," (Stats. 1864-5, 286, Sec. 16) was repealed by the general act of March 9, 1866, relating to officers, (Stats. 1866, 231) requiring all appointments to county and township offices to run "until the next general election." *State v. Wells*, 105.
2. **DISTRICT ATTORNEY TO HOLD OFFICE TILL SUCCESSOR QUALIFIED.** Although the statute makes no provision that a district attorney, whether elected or appointed, shall hold office until the qualification of a successor, yet he must do so under the general rule, because the presence of such an officer is necessary to the proper conduct of the public business. *State v. Wells*, 105.

LIABILITY ON OFFICIAL BOND OF APPOINTED DISTRICT ATTORNEY. See **BOND**, 1, 2.

EJECTMENT.

1. **EJECTMENT—OWNER OF LEGAL TITLE PROPER PARTY PLAINTIFF.** Where a deed of mining ground by grant, bargain, sale, remise, release, conveyance, and quit-claim was made to one person for the use and benefit of another: *Held*, that the former was the owner of the legal title and the proper party to maintain an action at law for a disturbance of the possession thereof. *Phillpotts v. Blasdel*, 61.
2. **DEFENSE TO EJECTMENT ON TOWN-SITE TRUSTEE'S DEED.** Though an occupant of a town lot, by neglecting to present his claim in accordance with the statute relating to town-sites, may be barred of the "right of claiming or recovering such land or any interest or estate therein," (Stats. 1866, 54, Sec. 4) there is nothing to prevent him from showing, in defense to an ejectment by a person who procures a deed, that such plaintiff has no title and from thus protecting his possession. *Treadway v. Wilder*, 91.
3. **IN EJECTMENT ON PRIOR POSSESSION, SUCH POSSESSION MUST BE SHOWN.** In case of a judgment in ejectment for plaintiff, where he relies upon prior possession alone, if the testimony fails to show any act of possession such judgment will be reversed. *Lynch v. Lawson*, 162.

WARRANTOR OF TITLE MAY BE VOUCHERED TO PROSECUTE EVICTOR. See **WARRANTY**, 1.

ELECTIONS.

ORGANIZATION OF EUREKA COUNTY—ELECTION FOR COUNTY OFFICERS. See **COUNTY COMMISSIONERS**, 2, 3.

APPOINTMENT NOT TO INTERFERE WITH REGULAR TERM OF OFFICER ELECTED. See **OFFICES AND OFFICERS**, 1.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—CONDEMNATION OF LAND FOR RAILROAD AFTER ORIGINAL CONSTRUCTION.** The fact that a railroad has been constructed according to the surveys and maps originally filed, does not prevent it from condemning other land which may be necessary and proper for its purposes; and a petition for condemnation under such circumstances is not demurrable for setting up such construction. *Virginia and Truckee R. R. Co. v. Lovejoy*, 100.
2. **CONDEMNATION OF LAND—VERBAL ERRORS IN COMMISSIONERS' REPORT.** Where a report of commissioners appointed to appraise land condemned for railroad purposes allowed a round sum for "the value of said ground appropriated and the damage to the remainder of the premises by reason of the severance of the part taken," etc.: *Held*, that though "damages to the remainder" were not a matter of distinct allowance, yet, as they were an element of estimate in arriving at a "just compensation" for the land actually taken, the error of the report, being one of form rather than of substance—of expression rather than of real meaning, would not vitiate it. *Virginia and Truckee R. R. Co. v. Henry*, 165.
3. **"COMPENSATION FOR LAND TAKEN" IS NOT MERE "MARKET VALUE."** The statute providing for "compensation" and "damages" to be awarded for lands condemned for railroad purposes (Stats. 1864-5, 427, Sec. 30) does not contemplate the giving of the mere "market value" of the land taken; and if it did it would in that regard be unconstitutional. *Virginia and Truckee R. R. Co. v. Henry*, 165.
4. **"VALUE" SWORN BEFORE ASSESSOR NOT EVIDENCE OF VALUE ON CONDEMNATION.** The valuation which a person puts upon his property before an assessor for taxation purposes, though it may perhaps be admissible by way of contradiction of the owner's testimony to the contrary, has no weight, and is in fact incompetent as independent evidence in determining the value of such property on proceedings for condemning it for railroad purposes. *Virginia and Truckee R. R. Co. v. Henry*, 165.
5. **COMPENSATION FOR LAND TAKEN—"SPECIAL INJURY TO BUSINESS" IRRELEVANT.** Upon an inquiry as to the compensation to be awarded a person whose property is condemned for railroad purposes, testimony as to special injury to such person's business is irrelevant. *Virginia and Truckee Railroad Co. v. Henry*, 165.
6. **REPORT OF COMMISSIONERS—OMISSION OF TESTIMONY.** Though it is good practice for commissioners on proceedings for the condemnation of land for public uses to present with their report all the testimony, as suggested in *Virginia and Truckee R. R. Co. v. Lovejoy*, 8 Nev. 100, it is not vital error not to do so, and especially when the omitted testimony appears to have been immaterial. *Virginia and Truckee R. R. Co. v. Henry*, 165.
7. **OBJECTIONS TO TESTIMONY BEFORE COMMISSIONERS.** Upon a proceeding before commissioners to appraise the compensation to be paid for private lands taken for railroad purposes, if improper or irrelevant testimony be introduced, timely objection thereto should be made or no advantage can be taken of the error. *Virginia and Truckee R. R. Co. v. Henry*, 165.

8. **MODE OF ESTIMATION OF COMPENSATION FOR LAND TAKEN.** The compensation to be paid the owner of land taken for railroad purposes is most readily and fairly ascertained by determining the value of the whole land without the railway and of the portion remaining after the railway is built—the difference being the true compensation to which the party is entitled. *Virginia and Truckee R. R. Co. v. Henry*, 165.
9. **POWERS OF COMMISSIONERS.** Commissioners appointed to appraise the compensation to be paid the owner of property taken for public uses are not on questions of fact confined and limited as a jury: though they hear and weigh the allegations and testimony offered, they themselves view the premises and are supposed to exercise their own judgment to some extent, irrespective of the evidence adduced. *Virginia and Truckee R. R. Co. v. Henry*, 165.
10. **VIRGINIA AND TRUCKEE R. R. CO. v. ELLIOT**, 5 NEV. 358, on the point that the decision of commissioners in estimating the compensation to be paid for lands taken for railroad purposes will not be set aside if there be any substantial testimony to support it, affirmed with a view of settlement of question. *Virginia and Truckee R. R. Co. v. Henry*, 165.

MEANING OF "JUST COMPENSATION" IN CONSTITUTION. See DEFINITIONS, 1.

REPORT OF COMMISSIONERS TO "SET FORTH THEIR PROCEEDINGS." See RAILROADS, 1.

APPRAISAL OF LAND TAKEN BY RAILROAD AFTER ORIGINAL CONSTRUCTION. See RAILROADS, 2.

CONDEMNATION OF LAND FOR RAILROADS—"DAMAGES TO RESIDUE OF PREMISES." See RAILROADS, 6.

EXPIRATION OF FRANCHISE—REVERTER TO SOVEREIGN. See ROADS AND BRIDGES, 1.

EQUITY.

1. **RIGHT TO SPECIFIC PERFORMANCE WITHOUT PREVIOUS DEMAND.** Where a party located certain mining ground in his own name but under contract for another person: *Held*, that there was an implied promise to convey upon request and that such other person at once acquired a right to a specific performance, which might be enforced in equity without a previous request. *Welland v. Huber*, 208.

COSTS IN EQUITY—SPECIFIC PERFORMANCE CASES. See COSTS, 2.

NO STRICT RIGHT TO JURY TRIAL IN EQUITY CASES. See JURY, 5.

DEED ABSOLUTE ON ITS FACE WHEN A MORTGAGE—GRANTEE OF GRANTEE. See MORTGAGE, 1.

TITLE OF PATENTEE OF PUBLIC LAND UNAFFECTED BY HIS PREVIOUS QUITCLAIM DEED. See PATENT, 1.

EQUITABLE CHARACTER OF ACTION NOT DESTROYED BY ANSWER DENYING TITLE.
See PLEADING, 12.

EQUITIES AGAINST DEED UNDER CONGRESSIONAL TOWN-SITE ACT. See TOWN-SITE, 1.

ERROR.

OBJECTIONS NOT CONSIDERED ON APPEAL WHEN NOT PROPERLY PRESENTED.
See APPEAL, 12.

NO REVERSAL WHERE NO PREJUDICE. See APPEAL, 14.

NO ERROR IN EXCLUDING IMMATERIAL EVIDENCE. See EVIDENCE, 1.

NO ERROR TO REFUSE JURY WHERE NO STRICT RIGHT THERETO. See JURY, 6.

INFINITESIMAL ERROR DOES NOT VITIATE JUDGMENT. See PLEADING, 1.

ESCAPE.

POSTPONEMENT OF SENTENCE IN CASE OF ESCAPE. See CRIMINAL LAW, 13, 14.

EUREKA COUNTY.

ORGANIZATION OF EUREKA COUNTY—ELECTION FOR COUNTY OFFICERS. See COUNTY COMMISSIONERS, 2, 3.

EVIDENCE.

1. NO ERROR IN EXCLUDING IMMATERIAL EVIDENCE. In an action of replevin, where defendant justified under a writ of attachment and execution, and it appeared that the attachment and judgment were admitted but that the suit constituted no justification: *Held*, that the execution was immaterial and its exclusion on any other ground was not error. *Blackie v. Cooney*, 41.
2. ACTION AGAINST LESSEES FOR LABOR—WHEN LEASES RELEVANT EVIDENCE. Where a person sued for labor performed at a quartz mill for an association of lessees thereof: *Held*, that the leases and contract under which the lessees prosecuted the work were relevant evidence to show the character of the association and establish their interest in the labor on which plaintiff was employed. *Fulton v. Day*, 80.
3. EVIDENCE PROPERLY ADMITTED IF PERTINENT FOR ANY PURPOSE. In an action against a number of persons for work and labor performed at the request of one of them, supposed to be the agent of all, where a letter and telegrams of such person directing the employment were admitted in evidence against the sole objection that no power was shown in him to bind the others: *Held*, that the evidence was pertinent at least to bind him and properly admitted. *Fulton v. Day*, 80.

4. ACTION AGAINST RAILROAD FOR NEGLIGENCE IN KILLING CATTLE—BURDEN OF PROOF. In an action against a railroad company for killing a domestic animal, which has strayed upon its track from land not belonging to its owner, it is incumbent on the plaintiff to show negligence on the part of the company. *Walsh v. Virginia and Truckee R. R. Co.*, 110.
5. ACTION ON INDEMNITY BOND AGAINST LIABILITY—WHAT TO BE SHOWN. In an action on a bond given to a sheriff to indemnify him against "all damages, expenses, costs and charges, and against all loss and liabilities which said sheriff shall sustain or in any wise be put to," it is sufficient to show a liability by way of judgment against him, without showing payment thereof. *Jones v. Childs*, 121.
6. WARRANTY OF TITLE—EVIDENCE OF EVICTION AND OF SUPERIOR TITLE. In an action for breach of warranty of title, the judgment roll in a previous action by the same plaintiff against the evictors in which he failed to recover the premises warranted, is admissible in evidence as against any person who was neither party nor privy to it only for the purpose of showing an eviction: it is not even *prima facie* evidence that such eviction was by title paramount. *Dalton v. Bowker*, 190.
7. IF ONE PARTY TESTIFY TO CONVERSATION, THE OTHER PARTY MAY ALSO TESTIFY TO IT. In an action between the grantor and grantee of a deed, where it is a material question which of several streams was meant by the conveyance of a right to use the waters of "Thomas Creek": *Held*, that if plaintiff testify to any conversation between himself and defendant relative thereto, defendant has a right to state his recollection of what was said and testify in regard to the same conversation. *Dalton v. Bowker*, 190.
8. DECLARATIONS OF DEFENDANT EXCULPATING HIMSELF AND INculpATING CO-DEFENDANTS. A mere gratuitous assertion by one of several defendants charged with crime, exculpating himself and inculpating his co-defendants, should never be received as evidence against any one but himself. *State v. Ah Tom*, 213.
9. DISTINCTION IN DEGREES OF EVIDENCE REQUIRED IN PROOF OF GUILT OR IN MITIGATION. In criminal cases, evidence tending to prove guilt must be established beyond a reasonable doubt; that tending to mitigate or disprove, by a preponderance of testimony. *State v. Pierce*, 291.

OBJECTION OF INSUFFICIENT EVIDENCE. See APPEAL, 2.

PRESUMPTIONS IN FAVOR OF ORDER GRANTING NEW TRIAL. See APPEAL, 3.

APPEAL FROM ORDER GRANTING NEW TRIAL—SUFFICIENCY OF EVIDENCE. See APPEAL, 5.

CONFLICTING EVIDENCE. See APPEAL, 6.

REVERSAL OF CONVICTION FOR WANT OF COMPETENT EVIDENCE. See APPEAL, 13.

IRRELEVANT TESTIMONY—NO REVERSAL WHERE NO PREJUDICE. See APPEAL, 14.

ASSIGNMENT AFTER SUIT BROUGHT BY ASSIGNEE IRRELEVANT. See ASSIGNMENT, 3.

INSTRUCTION ON POINT NOT IN EVIDENCE PROPERLY REFUSED. See CHARGE, 1.

INSTRUCTION NOT TO CONSIDER EXCLUDED EVIDENCE. See CHARGE, 2.

PRESUMPTIONS IN FAVOR OF INSTRUCTIONS, WHERE EVIDENCE NOT APPEALED. See CHARGE, 4.

INSTRUCTION MUST APPLY TO CASE MADE BY EVIDENCE. See CHARGE 6.

DECLARATION OF CO-DEFENDANT AFTER OFFENSE NOT EVIDENCE AGAINST OTHERS. See CRIMINAL LAW, 6.

PROOF BEYOND REASONABLE DOUBT NOT REQUIRED TO ESTABLISH MITIGATORY CIRCUMSTANCES. See CRIMINAL LAW, 15.

DAMAGES ON WARRANTY, FOR EVICTION—PRESENT VALUE NOT RELEVANT. See DAMAGES, 3.

EFFECT OF STIPULATION TO TAKE DEPOSITION AS ADMISSION. See DEPOSITION, 1.

CERTIFICATE TO DEPOSITION TAKEN OUT OF STATE, WHAT TO CONTAIN. See DEPOSITION, 2, 3.

IN EJECTMENT ON PRIOR POSSESSION, SUCH POSSESSION MUST BE SHOWN. See EJECTMENT, 3.

"VALUE" SWORN BEFORE ASSESSOR NOT EVIDENCE OF VALUE ON CONDEMNATION. See EMINENT DOMAIN, 4.

REPORT OF COMMISSIONERS—OMISSION OF TESTIMONY. See EMINENT DOMAIN, 6.

OBJECTION TO TESTIMONY BEFORE COMMISSIONERS. See EMINENT DOMAIN, 7.

MERE KILLING OF ANIMAL BY RAILROAD NOT EVIDENCE OF NEGLIGENCE. See NEGLIGENCE, 2.

NEW TRIAL, WHEN TO BE GRANTED BY NISI PRIUS COURT ON WEIGHT OF EVIDENCE. See NEW TRIAL, 1.

QUESTION OF WEIGHT OF EVIDENCE—DIFFERENCE BETWEEN NEW TRIAL MOTION AND APPEAL. See NEW TRIAL, 2.

RAILROAD, WHEN LIABLE FOR KILLING STRAYING CATTLE—EVIDENCE. See RAILROADS, 5.

OMISSION OF "DOLLAR-MARK" IN TAX ASSESSMENT ROLL. See TAXES, 2, 3.

PRACTICE ACT, SEC. 379—MEANING OF "REPRESENTATIVE OF DECEASED PERSON." See WITNESS, 1.

EXCEPTIONS.

1. REFUSAL TO SETTLE EXCEPTIONS TO BE PROPERLY EXCEPTED TO. Where a motion to settle a bill of exceptions in a criminal case was refused on the ground that it was not presented in time and that the affidavit on the motion did not show sufficient excuse for the delay; and on appeal there was no bill of exceptions or statement embodying such affidavit: *Held*, that the Supreme Court could not regard the affidavit or consider whether it showed sufficient excuse or not. *State v. Baker*, 141.

AMENDMENT, AFTER FILING, OF BILL OF EXCEPTIONS IN CRIMINAL CASE. See AMENDMENTS, 3.

PAPERS NOT NOTICED ON APPEAL UNLESS MADE PART OF RECORD. See APPEAL, 8.

OBJECTIONS NOT CONSIDERED WHEN NOT PROPERLY PRESENTED. See APPEAL, 12.

CRIMINAL LAW—COURT'S OWN CHARGE NOT DEEMED EXCEPTED TO. See CHARGE, 3, 5.

TIME OF SETTLEMENT OF BILL OF EXCEPTIONS IN CRIMINAL CASES. See CRIMINAL LAW, 2.

PEREMPTORY CHALLENGES IN CRIMINAL CASES NOT PART OF RECORD. See CRIMINAL LAW, 3.

WHAT INSTUCTIONS IN CRIMINAL CASES MUST BE EXCEPTED TO. See CRIMINAL LAW, 8.

APPEAL FROM ORDER SUSTAINING DEMURRER TO INDICTMENT—RECORD, HOW MADE. See CRIMINAL LAW, 17.

OBJECTION TO TESTIMONY BEFORE COMMISSIONERS. See EMINENT DOMAIN, 7.

EXECUTION.

ACTION ON JUDGMENT PENDING APPEAL, WHERE EXECUTION NOT STAYED. See APPEAL 1.

EXECUTORS AND ADMINISTRATORS.

CAPACITY OF FOREIGN ADMINISTRATOR TO SUE ON JUDGMENT. See PARTIES, 1.

FEES.

FEES OF EXTRA COUNSEL, EMPLOYED FOR COUNTY. See COUNTIES, 2.

SHERIFF'S FEES IN DELINQUENT TAX SUITS. See SHERIFF, 1.

DELINQUENT TAX SUITS—WHEN FEES PAYABLE BY COUNTY. See TAXES, 7.

FENCES.

1. CONSTRUCTION OF RAILROAD LAW AS TO FENCES. The railroad law in reference to fences (Stats. 1864-5, 427, Sec. 40) providing that companies shall "maintain a good and sufficient fence on either or both sides of their property," taken in connection with the further provision that they shall be liable for the killing of domestic animals "when they stray upon their line of road where it passes through or alongside of the property of the owners thereof," simply requires companies to fence their road where it may run through or alongside of the land of private individuals; that is, on either or both sides, as occasion may demand; and even then the fencing is only for the protection of adjoining owners, and no other person can complain of the want of it. *Walsh v. Virginia and Truckee R. R. Co.*, 110.

RAILROADS NEED NOT FENCE ON PUBLIC LAND. See RAILROADS, 4.

FILING.

NOTICE OF APPEAL MUST BE FILED BEFORE COPY SERVED. See APPEAL, 10.

COMPLAINT ON MECHANIC'S LIEN--OMISSION OF ALLEGATION OF TIME OF FILING. See PLEADING, 10.

FINDINGS.

RECITAL OF LEGAL SERVICE OF SUMMONS IN JUDGMENT. See JUDGMENT, 3.

FORCIBLE ENTRY AND DETAINER.

1. JURISDICTION OF ACTION OF FORCIBLE ENTRY AND DETAINER. An action for "wrongfully, unlawfully, and forcibly breaking and entering into real estate and unlawfully and forcibly ousting the possessor and ever since said forcible ouster unlawfully and forcibly holding possession thereof," is an action of forcible entry and unlawful detainer within the meaning of the constitution, (Art. VI, Sec. 6) and not within the jurisdiction of a justice of the peace. *Peacock v. Leonard*, 84.
2. GRAVAMEN OF COMPLAINT CHARGING "FORCIBLE AND UNLAWFUL ENTRY." In an action for "wrongfully, unlawfully, and forcibly breaking and entering into real estate and ousting the possessor and unlawfully and forcibly holding possession thereof," the gravamen of the complaint is the forcible entry alleged; for the reason that although the epithet "unlawfully" is also annexed to the entry charged, it cannot be treated as a substantive cause of action distinct from the forcible entry. *Peacock v. Leonard*, 84.
3. NO OFFENSE OF "UNLAWFUL" AS DISTINCT FROM "FORCIBLE ENTRY." On statutes do not provide for or create any such offense as an "unlawful" as distinguished from a "forcible entry," within the meaning of the term "unlawful" as employed in the constitutional grant of jurisdiction. (Art. VI, Sec. 8.) *Peacock v. Leonard*, 84.

4. GIST OF ACTION FOR "FORCIBLE ENTRY AND UNLAWFUL DETAINER." In a complaint charging a forcible entry and unlawful detainer, the gist of the action is the forcible entry, the detainer not being stated as an independent ground of relief, but as a mere continuation or consequence of the entry. *Peacock v. Leonard*, 84.

JUDGMENT ON APPEAL FROM JUSTICE FOR FORCIBLE ENTRY ANNULLED. See CERTIORARI, 1.

WRIT OF RESTITUTION—WHEN ISSUED BY SUPREME COURT. See PRACTICE, 2.

FRANCHISE.

LOCATION OF FRANCHISES GRANTED BY FIRST LEGISLATURE OF STATE. See CONSTRUCTION, 6.

STATUTORY CONTRACT OF DEDICATION BY ACCEPTANCE OF FRANCHISE. See DEDICATION.

EXPIRATION OF FRANCHISE—REVERTER TO THE SOVEREIGN. See ROADS AND BRIDGES, 1.

TOLL ROAD WITH EXPIRING FRANCHISE NOT TO BE LOCATED AS NEW ROAD. See ROADS AND BRIDGES, 2.

EXPIRED BRIDGE FRANCHISE—RIGHTS OF FRANCHISEE AS LAND OWNER. See ROADS AND BRIDGES, 4.

MERGER OF CLAIMS TO EASEMENT BY ACCEPTANCE OF FRANCHISE. See ROADS AND BRIDGES, 5.

GOLD COIN.

1. GOLD COIN JUDGMENT FOR LIABILITY ON INDEMNITY BOND. A judgment against the sureties on a bond indemnifying a sheriff against liability, where the penalty of the bond and also the liability incurred by the sheriff are payable in gold coin, is properly rendered in gold coin. *Jones v. Childs*, 121.

HUMBOLDT COUNTY.

ACT FOR REMOVAL OF COUNTY SEAT OF HUMBOLDT COUNTY. See COUNTY SEATS, 1.

HUSBAND AND WIFE.

1. RIGHT OF MARRIED WOMAN TO CONTRACT IN CASE OF ABANDONMENT. The exception to the common law disability of a married woman to contract or maintain a suit, in case of abandonment by her husband, does not apply except in case the abandonment is absolute and embraces a total renunciation of marital relations. *Beckman v. Stanley*, 257.

CONVEYANCE BY ABANDONED WIFE, HUSBAND MUST JOIN. See DEED, 6.

ACTION NOT MAINTAINABLE BY MARRIED WOMAN PLAINTIFF WITHOUT PROPER
AVERMENTS. See PLEADING, 9.

INDEMNITY.

LIABILITY ON INDEMNITY BOND AGAINST "LIABILITY." See BOND, 3.

ACTION ON INDEMNITY BOND AGAINST LIABILITY, WHAT TO BE SHOWN. See EVIDENCE, 5.

GOLD COIN JUDGMENT FOR LIABILITY ON INDEMNITY BOND. See GOLD COIN, 1.

INDICTMENT.

1. INDICTMENT FOR LARCENY OF PROPERTY BROUGHT FROM ANOTHER COUNTY. If property feloniously taken in one county be removed by the thief into another, the jurisdiction of the offense may, under section 90 of the Criminal Practice Act, be in either; but an indictment in the latter county must allege the offense to have been committed in such county or that the bringing of the property into such county was felonious; and if it do not, it will not be sufficient. *State v. Brown*, 208.
2. MISNOMER OF ACCUSED PERSON IN INDICTMENT. A defendant in a criminal case should be indicted by his true name when known; but if unknown, he may be indicted by any name that is sufficient to identify him; and when arraigned, if he do not give his true name upon request, he cannot complain of being tried by the name specified in the indictment or the name given upon arraignment, though subsequently proved to be not the true name. *State v. Burns*, 251.
3. GRAND LARCENY OF ORE—SUFFICIENCY OF INDICTMENT. Where it was objected to an indictment for grand larceny of certain "silver bearing ore" that the property alleged to have been stolen savored of the realty: *Held*, that as "ore" in its usual acceptation meant something severed from the realty, there was a sufficient statement of facts in the indictment showing it to be personal property. *State v. Berryman*, 262.
4. SUPERFLUOUS MATTER IN INDICTMENT. An indictment is not insufficient on account of containing more than the statute demands, if there be nothing in it to perplex a person of ordinary understanding or injure the defendant. *State v. Pierce*, 291.
5. ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF INDICTMENT. An indictment charging that defendant "without authority of law and with malice aforethought did shoot at William Newsom with a shot-gun loaded with leaden bullets, with intent to kill him, the said William Newsom," etc., is a sufficient indictment of the statutory offense of assault with intent to commit murder. *State v. Robey*, 312.

6. **INDICTMENT FOR FELONIOUS ASSAULT—NON-ESSENTIALS.** It is not essential that an indictment or verdict for an assault with a deadly weapon with intent to inflict a bodily injury should state that the offense was committed "without considerable provocation" or "where the circumstances show an abandoned and malignant heart." *State v. Robey*, 312.

APPEAL FROM ORDER SUSTAINING DEMURRER TO INDICTMENT. See **CRIMINAL LAW**, 17.

ASSAULT WITH DEADLY WEAPON, ETC., INCLUDED IN "ASSAULT WITH INTENT TO MURDER." See **CRIMINAL LAW**, 18.

INSTRUCTIONS.

[See **CHARGE**.]

INTEREST.

INTEREST AS DAMAGES IN REPLEVIN CASES. See **DAMAGES**, 1.

INTERPLEADER.

1. **ACTION FOR RENT BY PARTY OTHER THAN LESSOR—INTERPLEADER.** If a lessee be sued for rent by any person other than the lessor and fears liability to double payment, he can escape such liability by bill of interpleader. *McCoy v. Bateman*, 126.

JUDGE.

[See **COURTS AND JUDGES**.]

JUDGMENT.

1. **SUIT ON CALIFORNIA JUDGMENT PENDING APPEAL.** Where an administrator recovered a money judgment in a California district court, and it was appealed to the supreme court of that state, but no undertaking on appeal sufficient to stay execution was filed: *Held*, that there was nothing in the fact and pendency of such appeal to prevent the maintenance by such administrator of a suit on the judgment in this State. *Rogers v. Hatch*, 35.
2. **NO VALID JUDGMENT EXCEPT AT PRESCRIBED TIME AND PLACE.** It is indispensable to the validity of a judgment that it be rendered at the time and place prescribed by law. *State v. Roberts*, 239.

3. RECITAL OF LEGAL SERVICE OF SUMMONS IN JUDGMENT. The finding and recital of a legal service of summons in a judgment is as much a part of the record and entitled to the same credence as the file marks of the clerk anterior to such service. *Blasdel v. Kean*, 305.

AMENDMENT OF JUDGMENT OF SUPREME COURT. See AMENDMENT, 2.

JUDGMENT TO BE AFFIRMED UPON NEGLECT TO ARGUE APPEAL. See APPEAL, 4.

APPEAL FROM ORDER REFUSING TO SET ASIDE JUDGMENT. See APPEAL, 7.

APPEAL FROM JUDGMENT UPON REMITTITUR NOT ENTERTAINED. See APPEAL, 9.

JUDGMENT ON APPEAL FROM JUSTICE FOR FORCIBLE ENTRY ANNULLED. See CERTIORARI, 1.

JUDGMENT ROLL IN CERTIORARI CASES. See CERTIORARI, 2.

"DEFAULT" NOT NECESSARY TO SUPPORT JUDGMENT AFTER DEMURRER OVER-
RULED. See DEFAULT, 1.

IN EJECTMENT ON PRIOR POSSESSION, SUCH POSSESSION MUST BE SHOWN. See
EJECTMENT, 3.

GOLD COIN JUDGMENT FOR LIABILITY ON INDEMNITY BOND. See GOLD COIN, 1.

CAPACITY OF FOREIGN ADMINISTRATOR TO SUE ON JUDGMENT. See PARTIES, 1.

INFINITESIMAL ERROR DOES NOT VITIATE JUDGMENT. See PLEADING, 1.

JURISDICTION.

1. JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE'S COURT. A district court on appeal has exactly the same jurisdiction as the justice of the peace from whose court the appeal is taken. *Peacock v. Leonard*, 84.
2. PROCEEDINGS OF DISTRICT COURT WITHOUT JURISDICTION UTTERLY VOID. Where the proceedings of a district court on appeal from a justice's court were annulled on *certiorari* by the Supreme Court, and afterwards the district court pronounced a judgment in terms similar to that of the Supreme Court and in addition ordered a writ of restitution previously issued to be set aside with costs and directed the sheriff to put the plaintiff out and the defendant or his grantee in possession: *Held*, that the district court having no jurisdiction, its judgment and orders were utterly void. *Leonard v. Peacock*, 157.
3. JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE FINAL. The appellate jurisdiction of the district court on appeal from a justice's court is final (Const. Art. VI, Sec. 6), and no appeal lies from its action as such appellate court. *Leonard v. Peacock*, 157.

4. ACTION AGAINST COUNTY—JURISDICTION—CHANGE OF VENUE. An action against a county is a civil suit; and in the absence of any special provision of statute to the contrary it is governed by the same rules of practice applicable to other civil suits in reference to jurisdiction and change of venue. *Clarke v. Lyon County*, 181.
5. NO LEGAL TERM OF COURT EXCEPT AT TIME PRESCRIBED. Where the June term of a district court was fixed by statute to commence on June 5; but the judge did not make his appearance until June 22 and then held what purported to be the June term, without however having ordered an adjournment as provided by law (Stats. 1869, 186): *Held*, that the June term had lapsed and that all the proceedings were *coram non jure*. *State v. Roberts*, 239.

SUPREME COURT DECISIONS—IMPLIED ADJUDICATION OF QUESTION OF JURISDICTION. See APPEAL, 11.

JURISDICTION TO ORDER DEFENDANT IN ATTACHMENT TO DELIVER UP STOCK. See ATTACHMENT, 1.

CERTIORARI—NO AFFIRMATIVE ACTION AFTER PROCEEDINGS ANNULLED. See CERTIORARI, 3.

INQUIRY UPON CERTIORARI. See CERTIORARI, 6.

NO CERTIORARI WHERE NO EXCESS OF JURISDICTION. See COUNTY COMMISSIONERS, 3.

NO VALID CONVICTION EXCEPT AT LEGAL TERM OF COURT. See CRIMINAL LAW, 7.

POSTPONEMENT OF SENTENCE IN CASE OF ESCAPE—SENTENCE AT SUBSEQUENT TERM. See CRIMINAL LAW, 13.

POWERS OF COMMISSIONERS TO APPRAISE LAND TAKEN FOR RAILROAD. See EMINENT DOMAIN, 7.

JURISDICTION OF ACTION OF FORCIBLE ENTRY AND DETAINER. See FORCIBLE ENTRY AND DETAINER, 1.

WRIT OF RESTITUTION, WHEN ISSUED BY SUPREME COURT. See PRACTICE, 2.

JURY.

1. SEPARATION OF JURY, WHEN NOT PREJUDICIAL. Where a juror, after retiring to deliberate upon a verdict, found it necessary to leave the jury-room for a few moments, and did so, simply going to the rear of the court-house and returning immediately, and it appeared affirmatively that during such separation he had no intercourse or conversation with any one respecting the trial: *Held*, no ground for disturbing the verdict. *Carnaghan v. Ward*, 30.

2. **CONVERSATION OF ATTORNEY WITH JUROR, WHEN NOT PREJUDICIAL.** Where an attorney of the prevailing party saw one of the jurors, after retirement, leave the jury-room for a few moments, and supposing that a verdict had been agreed upon, inadvertently asked him if such were the case, and was answered in the negative: *Held*, that such conversation could not have prejudiced the other side, and would not authorize a setting aside of the verdict. *Carnaghan v. Ward*, 30.
3. **ATTORNEY SENDING FOR MEDICINE FOR JUROR.** Where a juror, after retirement, being for a few moments outside of the jury-room, asked an attorney of the prevailing party to send some one for a bottle of liniment which was prepared for him at a drug store, and which he wished to use as he was lame and suffering pain; and the attorney replied he would do so, and the liniment was afterwards passed in to the juror by the officer in charge: *Held*, that the compliance with the juror's request was not such an act as would vitiate the verdict. *Carnaghan v. Ward*, 30.
4. **DIFFERENCE BETWEEN "TREATING" A JUROR AND PERFORMING A MERE ACT OF HUMANITY.** There is a marked distinction between the performance of a mere act of humanity or duty for a juror, such as sending at his request for liniment to relieve his pain, and the voluntary offer of civilities, such as the treating with spirituous liquors, passed on in *Sacramento and Meredith M. Co. v. Shovers*, 6 Nev. 291, which neither duty, charity, nor the conventionalities of society require. *Carnaghan v. Ward*, 30.
5. **NO STRICT RIGHT TO JURY TRIAL IN EQUITY CASE.** Before a jury trial can be claimed as a constitutional right, there must be an action at law, as contradistinguished from a suit in equity and from a special proceeding, or a criminal action and an issue of fact joined therein upon the pleadings. *Lake v. Tolles*, 285.
6. **NO ERROR TO REFUSE JURY WHERE NO STRICT RIGHT THERETO.** Where there is no strict constitutional right to a jury trial, the calling of a jury is purely a matter of discretion with the judge; and his refusal will not constitute error. *Lake v. Tolles*, 285.

CLERK'S MINUTES OF PEREMPTORY CHALLENGES NOT PARTS OF RECORD. See **CRIMINAL LAW**, 3.

JUSTICE OF THE PEACE.

JUDGMENT ON APPEAL FROM JUSTICE FOR FORCIBLE ENTRY ANULLED. See **CERTIORARI**, 1.

JURISDICTION OF FORCIBLE ENTRY AND DETAINER NOT IN JUSTICE. See **FORCIBLE ENTRY AND DETAINER**, 1.

JURISDICTION OF DISTRICT COURT ON APPEAL FROM JUSTICE'S COURT. See **JURISDICTION**, 1, 3.

LAND.

1. **CONTRACTS BETWEEN PRE-EMPTIONERS—RULE IN *ROSE v. TREADWAY*, 4 NEV. 455.** The rule announced in *Rose v. Treadway*, 4 Nev. 455—to the effect that a contract, by which one party entitled to pre-empt certain land agrees to make no claim in consideration of which the other party agrees to pre-empt a larger tract and after obtaining title to convey the smaller tract to the first party, is neither in contravention of the pre-emption laws nor within the statute of frauds—may be considered to have become a rule of property in this State. *Treadway v. Wilder*, 91.

EFFECT OF QUIT-CLAIM DEED OF PUBLIC LAND. See DEED, 1.

TITLE OF PATENTEE OF PUBLIC LAND UNAFFECTED BY HIS PREVIOUS QUIT-CLAIM DEED. See PATENT, 1.

RIGHTS OF RAILROADS TO EXCLUSIVE POSSESSION OF RAILROAD LANDS. See RAILROADS, 3.

RAILROADS NEED NOT FENCE ON PUBLIC LANDS. See RAILROADS, 4.

RIGHT TO USE OF WATER AS DISTINCT FROM LAND. See WATER RIGHTS; 1.

MERE POSSESSOR OF PUBLIC LAND HAS NO RIPARIAN RIGHTS. See WATER RIGHTS, 2.

LANDLORD AND TENANT.

1. **ACTION FOR RENT—LESSEE CAN NOT DENY LESSOR'S TITLE.** Lessees, after the enjoyment of their term, can not defeat an action of their lessor for rent by setting up that they have paid the rent upon a judgment recovered against them by persons claiming to be co-tenants with their lessor. *McCoy v. Bateman*, 126.

ACTION AGAINST LESSEES FOR LABOR—WHEN LEASES RELEVANT EVIDENCE. See EVIDENCE, 2.

ACTION FOR RENT BY PARTY OTHER THAN LESSOR—INTERPLEADER. See INTERPLEADER, 1.

LARCENY.

LARCENY OF CATTLE STOLEN IN ONE COUNTY AND DRIVEN TO ANOTHER—VENUE. See CRIMINAL LAW, 4, 5.

LARCENY OF ARTICLES SEVERED FROM FREEHOLD. See CRIMINAL LAW, 11.

INDICTMENT FOR LARCENY OF PROPERTY BROUGHT FROM ANOTHER COUNTY. See INDICTMENT, 1.

LARCENY OF ORE—SUFFICIENCY OF INDICTMENT. See INDICTMENT, 3.

LEGISLATURE.

CONSTITUTIONAL PROHIBITION AGAINST LOCAL AND SPECIAL LEGISLATION. See CONSTITUTION, 1, 2, 3.

LEGISLATIVE INTENT TO BE CONSIDERED IN CONSTRUCTION OF STATUTE. See CONSTRUCTION, 1, 4.

LIMITATIONS.



1. **STATUTE OF LIMITATIONS—PART PAYMENT NO ACKNOWLEDGMENT.** Part payment under our statute of limitations does not avail to raise its bar. *Taylor v. Hendrie*, 243.
2. **REQUISITES OF NEW PROMISE OR ACKNOWLEDGMENT.** The acknowledgment or promise in writing, contemplated by the statute of limitations (Stats. 1861, 31, Sec. 30) to take a case out of its operation, must be made by the party to be charged or his authorized agent and to some one having interest or authority to receive it. *Taylor v. Hendrie*, 243.
3. **NEW PROMISE MUST BE TO SOME ONE AUTHORIZED.** Where Hendrie, being indebted on a note held by Huber, sent money to Curtis and wrote him a letter to apply it on the note and stating that he would soon send the balance: *Held*, that such letter was not a promise to Huber and not sufficient as evidence of a new or continuing contract to take the case out of the operation of the statute of limitations. *Taylor v. Hendrie*, 243.

PREScriptive RIGHT TO USE OF WATER, REQUISITES OF. See PLEADING, 5.

MANDAMUS.

1. **MANDAMUS, WHEN IT LIES.** Mandamus lies to compel an inferior tribunal to exercise its judgment and render a decision, when a failure of justice would otherwise result from delay or refusal to act; but it does not lie to review or correct its conclusion after it has acted. *State ex rel. Hetzel v. Eureka County Commissioners*, 309.

MARRIED WOMEN.

[See HUSBAND AND WIFE.]

MAXIMS.

ADMISSIO UNUS, EXCLUSIO ALTERIUS. See CONSTRUCTION, 6.

DOCTRINE OF STARE DECISIS. See CONSTRUCTION, 9.

"DE MINIBUS." See PLEADING, 1.

MECHANIC'S LIEN.

1. **MECHANICS' LIENS ASSIGNABLE.** Mechanics' liens are assignable and may be enforced by an action in the name of the assignee. *Skyrme v. Occidental Mill and M. Co.*, 219.
2. **WORDS USED IN ASSIGNMENT OF MECHANIC'S LIEN.** Where an assignment was indorsed on a mechanic's lien as follows: "For value and in consideration of the sum of one dollar in hand paid by Wm. Skeyrme, the receipt whereof is hereby acknowledged, I do sell, assign, transfer and set over to said Wm. Skeyrme the within lien and all my rights thereunder." *Held*, that the language used was broad enough to include the debt secured by the lien. *Skeyrme v. Occidental Mill and M. Co.*, 219.
3. **MECHANIC'S LIEN, WHAT.** The paper called a mechanic's lien is simply evidence that the acts required by statute have been performed and that therefore the lien created by the statute has attached; and an assignment of such paper with all rights thereunder is an assignment of the debt as well as of the lien. *Skeyrme v. Occidental Mill and M. Co.*, 219.
4. **EFFECT OF NEW LAW ON OLD MECHANICS' LIENS.** Where suit was brought to foreclose mechanics' liens which attached under the act of 1861 (Stats. 1861, 35) after the repeal of that law by the act of 1871 (Stats. 1871, 123); and it was claimed that the lien, being nothing but a remedy, fell with the repeal of the law: *Held*, that neither the lien was lost nor the right to enforce it. *Skeyrme v. Occidental Mill and M. Co.*, 219.
5. **NO JOINT MECHANICS' LIENS WITHOUT JOINT INTEREST.** There is no provision in the mechanics' lien law for filing joint liens when no community of interest exists; and, if an attempt has been made to file a joint lien, it does not prevent the several lien claimants from filing valid individual liens. *Skeyrme v. Occidental Mill and M. Co.*, 219.
6. **REQUISITES OF NOTICE OF MECHANIC'S LIEN.** Where the notice of a mechanic's lien recited that it was to secure the performance of a contract to pay the money specified in a certain note, given in settlement according to agreement for labor performed as a miner in extracting ore and working in a certain mine for a certain time: *Held*, that though it would have been better to state clearly the character of work and by whom and for whom done, yet it was not so defective as to prevent the enforcement of the lien. *Skeyrme v. Occidental Mill and M. Co.*, 219.
7. **EFFECT OF TAKING AND ASSIGNING NOTE UPON MECHANIC'S LIEN.** Where a person, who had done work as a miner in a mine, upon settlement and adjustment of accounts with the owner took his note as evidence of the amount due, and afterwards having filed a mechanic's lien for the amount assigned his note and lien to another person, who brought suit: *Held*, that no rights of the miner or his assignee were relinquished or lost by the acceptance or transfer of the note. *Skeyrme v. Occidental Mill and M. Co.*, 219.
8. **MECHANICS' LIEN LAW TO BE LIBERALLY CONSTRUED.** The mechanics' lien law is to be liberally construed so as to give lien claimants the benefits intended by the legislature. *Skeyrme v. Occidental Mill and M. Co.*, 219.

CONSTRUCTION OF MECHANICS' LIEN LAWS. See CONSTRUCTION, 3.

MECHANIC'S LIEN FOR WORK DONE BY MINER UNDER VARIOUS CONTRACTS. See MINES, 7.

COMPLAINT ON MECHANICS' LIENS—OMISSION OF ALLEGATION OF TIME OF FILING. See PLEADING, 10, 11.

MINES.

1. **MINING LEDGE MAY HAVE SEVERAL NAMES.** One and the same ledge may have two names, by which it may be known indifferently; and it may even become better known under a name derived from a subsequent and invalid location than under a name given it in an earlier and valid location. *Phillpotts v. Blasdel*, 61.
2. **SALE OF MINE BY ANOTHER NAME.** When a person conveys a lode of ore, we have only to ascertain by the best means in our power what lode he meant; and if we can do so, it makes no difference that he has called it by a name illegitimately acquired by or applied to it. *Phillpotts v. Blasdel*, 61.
3. **NAME, HOW IMPOSED UPON LODGE.** Placing a notice of location headed with a certain name upon a lode of ore is to christen it with such name. *Phillpotts v. Blasdel*, 61.
4. **NOTICE OF LOCATION OF MINING CLAIM, WHERE TO BE POSTED.** In order to hold a mining ledge, it is not necessary that the notice of location should be placed on the ore or any part of the vein or lode; it is sufficient if it be placed in such reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended. *Phillpotts v. Blasdel*, 61.
5. **RELOCATION OF MINING CLAIM UNDER ANOTHER NAME.** There is no law to prevent a person from relocating his own mining claim by a different name; and if he does so and then conveys it by the latter name, there is no reason why the existence of the former location should invalidate the deed. *Phillpotts v. Blasdel*, 61.
6. **ACTION AGAINST MINING PARTNER FOR SPECIFIC INTEREST—MATTER IN ISSUE.** Where under a mining partnership between Welland, Gross, Koch and Huber, in which each party was to have an equal interest, Huber located 1000 feet of mining ground, 400 in his own name and 200 in the name of each of his partners; and afterwards Welland, Gross and Koch brought suit against Huber for a dissolution and a conveyance to them of their interests in the 400 feet located in the name of Huber: *Held*, that the fact that Welland, Gross and Koch had conveyed all the interests located in their names to Huber and declared that they had sold out their interest in the mine, constituted no defense, and that the admission of such conveyances, as evidence that Huber had acquired plaintiffs' interests in the 400 feet located in his name, was error. *Welland v. Huber*, 203.
7. **MECHANIC'S LIEN FOR WORK DONE BY MINER UNDER VARIOUS CONTRACTS.** Where miners filed mechanics' liens for work done in the development of a mine, and it appeared that they worked a portion of the time under special contracts

and a portion of the time by the day, but always under the direction of the foreman of the mine: *Held*, that the work was to be considered as one continuous employment and not as distinct and independent jobs or contracts, and that each miner might file one lien for all his labor within the proper time after stopping work. *Skyrme v. Occidental Mill and M. Co.*, 219.

8. TROVER FOR MINING STOCK AGAINST ASSIGNEES FOR BENEFIT OF CREDITORS. Where a mining stock broker failed and assigned all his property for the benefit of his creditors; but one of them, for whom he had purchased stock in certain companies, declined to accept the assignment and demanded stock in such companies then held by the assignees, and upon their refusal to deliver brought trover as for a conversion: *Held*, that the fact that the assignees did not have sufficient of such stock to fill all the broker's contracts therefor could not be urged as a valid objection to a recovery. *Boylan v. Huguet*, 345.
 9. MINING STOCK TRANSACTIONS—BROKERS NEED NOT DELIVER IDENTICAL STOCK PURCHASED. In the ordinary transactions between principals and brokers, principals are not entitled to receive the identical shares of stock purchased on their order, and brokers are within the terms of their contracts so long as they are prepared to deliver on payment and demand certificates representing the requisite number of shares. *Boylan v. Huguet*, 345.
 10. PROPERTY IN MINING STOCK, WHAT. There is no special value or property in any particular share of mining stock, as distinguished from any other share, unless issued in the name of a party and charged to him upon the books of the company. *Boylan v. Huguet*, 345.
- ORDER UPON DEFENDANT IN ATTACHMENT TO DELIVER UP MINING STOCK. See ATTACHMENT, 1.
- LEGISLATIVE INTENT OF ACT TO TAX NET PROCEEDS OF MINES. See CONSTRUCTION, 1.
- CONVERSION OF MINING STOCK—"HIGHEST MARKET PRICE" NOT TRUE RULE OF DAMAGES. See DAMAGES, 5.
- WORDS "SILVER BEARING ORE," IMPLY SEVERANCE FROM FREEHOLD. See DEFINITIONS, 3.
- TAXES ON PROCEEDS OF MINES—WHEN THE \$15 PER TON EXEMPTION APPLIES. See TAXES, 1.
- IRRELEVANT MATTER IN STATEMENTS OF PROCEEDS OF MINES. See TAXES, 4.
- OBJECT OF NOTICE BY ASSESSOR OF UNPAID TAXES ON MINES. See TAXES, 5.
- TAXES ON PROCEEDS OF MINES TO BE COLLECTED QUARTERLY. See TAXES, 6.

MISNOMER.

- WHEN ACCUSED CANNOT COMPLAIN OF WRONG NAME. See CRIMINAL LAW, 10.
- MISNOMER OF ACCUSED PERSON IN INDICTMENT. See INDICTMENT, 2.

MORTGAGE.

1. DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE—GRANTEE OF GRANTEE. Where Leahigh contracted with Murphy to purchase a lot from him for \$400; and Bliss having advanced \$300 of the money as a loan to Leahigh at Leahigh's request took a deed of the property in his own name as a security for such loan; and afterwards Bliss sold the lot to White, who, however, had notice of the facts and of Leahigh's claim: *Held*, that under the circumstances White held only as mortgagee and that Leahigh had the right to redeem. *Leahigh v. White*, 147.

DEED DIRECT TO LOANER OF PURCHASE MONEY AS SECURITY. See DEED, 4.

MURDER.

CLOSING ARGUMENT IN CAPITAL CASES. See CRIMINAL LAW, 12.

PROOF BEYOND REASONABLE DOUBT NOT REQUIRED TO ESTABLISH MITIGATORY CIRCUMSTANCES. See CRIMINAL LAW, 15.

ASSAULT WITH DEADLY WEAPON, ETC., INCLUDED IN "ASSAULT WITH INTENT TO MURDER." See CRIMINAL LAW, 18.

ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF INDICTMENT. See INDICTMENT, 5.

NEGLIGENCE.

1. LIABILITY OF RAILROADS FOR INJURIES TO DOMESTIC ANIMALS. The leading principle of the numerous cases in reference to the liability of railroad companies for injuries to domestic animals, is that such liability is founded only upon negligence or omission of duty on the part of the company. *Walsh v. Virginia and Truckee R. R. Co.*, 110.

2. MERE KILLING OF ANIMAL BY RAILROAD NOT EVIDENCE OF NEGLIGENCE. The mere killing of a domestic animal by a railroad train is not evidence of negligence on the part of the railroad company. *Walsh v. Virginia and Truckee R. R. Co.*, 110.

NO ACTION FOR ACCIDENT IN PROSECUTION OF LAWFUL ACT. See ACCIDENT, 1.

JUDGMENT TO BE AFFIRMED UPON NEGLECT TO ARGUE APPEAL. See APPEAL, 4.

ACTION AGAINST RAILROAD FOR NEGLIGENCE IN KILLING CATTLE—BURDEN OF PROOF. See EVIDENCE, 4.

RAILROAD, WHEN LIABLE FOR KILLING STRAYING CATTLE. See RAILROADS, 5.

NEW TRIAL.

1. NEW TRIAL, WHEN TO BE GRANTED BY NISI PRIUS COURT. A judge who tries a cause should not hesitate to set aside the verdict, where there is a clear preponderance of evidence against it. *Phillpotts v. Blasdel*, 61.
2. QUESTION OF WEIGHT OF EVIDENCE—DIFFERENCE BETWEEN NEW TRIAL MOTION AND APPEAL. A *nisi prius* judge has jurisdiction on motion for new trial to decide as a question of fact, whether the scale of evidence against a verdict preponderates over that in favor of it; and his decision setting it aside will not be reversed by the appellate court except for the most cogent reasons, such as conclusive preponderance of evidence in favor of the verdict. *Phillpotts v. Blasdel*, 61.

PRESUMPTIONS IN FAVOR OF ORDER GRANTING NEW TRIAL. See APPEAL, 3.

APPEAL FROM ORDER GRANTING NEW TRIAL—SUFFICIENCY OF EVIDENCE. See APPEAL, 5.

SEPARATION OF JURY—WHEN NOT PREJUDICIAL. See JURY, 1.

CONVERSATION OF ATTORNEY WITH JUROR—WHEN NOT PREJUDICIAL. See JURY, 2.

ATTORNEY SENDING FOR MEDICINE FOR JUROR DOES NOT VITIATE VERDICT. See JURY, 3.

NEW TRIAL STATEMENT NEED NOT DESIGNATE GENERAL GROUNDS. See STATEMENT, 1.

NOTICE.

NOTICE OF APPEAL MUST BE FILED BEFORE COPY SERVED. See APPEAL, 10.

REQUISITES OF NOTICE OF MECHANIC'S LIEN. See MECHANIC'S LIEN, 6.

NAME, HOW IMPOSED UPON MINE BY NOTICE. See MINES, 3.

NOTICE OF LOCATION OF MINING CLAIM, WHERE TO BE POSTED. See MINES, 4.

DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE IN HANDS OF THIRD PERSON. See MORTGAGE, 1.

NOTICE OF MOTION FOR NEW TRIAL TO DESIGNATE GENERAL GROUNDS. See STATEMENT, 1.

OBJECT OF NOTICE BY ASSESSOR OF UNPAID TAXES ON MINES. See TAXES, 5.

BREACH OF WARRANTY OF TITLE—VOUCHER OF WARRANTOR BY PROPER NOTICE. See WARRANTY, 1.

OFFICES AND OFFICERS.

1. **APPOINTMENT NOT TO INTERFERE WITH REGULAR TERM OF OFFICER ELECTED.** A reasonable construction of the act of March 9, 1866, relating to officers and providing that persons appointed to fill vacancies are to hold "until the next general election," does not contemplate that an appointment to fill a vacancy, occurring after an election but before the newly elected officers are to assume their duties, can keep out of his regular term a person legally chosen at such election. *State v. Wells*, 106.
2. **NO "UTAH TERRITORY JUDGE" IN NEVADA TERRITORY.** Where it was claimed that a person assuming to act as probate judge of Carson County, Utah Territory, had granted a perpetuity of franchise in a toll-bridge in Nevada Territory: *Held*, that even if such claim of monstrous power were admitted, yet the pretended grant was void, because there was no Carson County, Utah Territory, after the erection of Nevada Territory; and there consequently could not have been any probate judge, even *de facto*, of such county. *State ex rel. Boardman v. Lake*, 276.
3. **"OFFICER DE FACTO"—REQUIREMENTS.** To constitute an officer *de facto* there must be an office, with a place for its exercise and an incumbent under claim of right. *State ex rel. Boardman v. Lake*, 276.

LIABILITY ON OFFICIAL BOND OF APPOINTED DISTRICT ATTORNEY. See **BOND**, 1.

LIABILITY ON OFFICIAL BOND OF "DE FACTO" OFFICER. See **BOND**, 2.

CERTIFICATE OF COMMISSIONER TO TAKE DEPOSITIONS TO HIS OWN OFFICIAL CHARACTER. See **DEPOSITIONS**, 2.

TERM OF DISTRICT ATTORNEY HOLDING BY APPOINTMENT. See **DISTRICT ATTORNEY**, 1.

DISTRICT ATTORNEY TO HOLD TILL SUCCESSOR QUALIFIED. See **DISTRICT ATTORNEY**, 2.

ORDER.

PRESUMPTIONS IN FAVOR OF ORDER GRANTING NEW TRIAL. See **APPEAL**, 3.

APPEAL FROM ORDER GRANTING NEW TRIAL—SUFFICIENCY OF EVIDENCE. See **APPEAL**, 5.

APPEAL FROM ORDER REFUSING TO SET ASIDE JUDGMENT. See **APPEAL**, 7.

ORDER UPON DEFENDANT IN ATTACHMENT TO DELIVER UP STOCK. See **ATTACHMENT**, 1.

APPEAL FROM ORDER SUSTAINING DEMURRER TO INDICTMENT. See **CRIMINAL LAW**, 17.

PARTIES.

1. CAPACITY OF FOREIGN ADMINISTRATOR TO SUE ON JUDGMENT. An objection of want of capacity to sue on the ground that the plaintiff is a foreign administrator without grant of letters in this State can not be sustained when the action is on a judgment previously obtained by him in his own state—the suit being in reality a personal one. *Rogers v. Hatch*, 35.

EJECTMENT—OWNER OF LEGAL TITLE PROPER PARTY PLAINTIFF. See EJECTMENT, 1.

ACTION FOR RENT BY PARTY OTHER THAN LESSOR—INTERPLEADER. See INTERPLEADER, 1.

ACTION NOT MAINTAINABLE BY MARRIED WOMAN PLAINTIFF WITHOUT PROPER AVERMENTS. See PLEADING, 9.

WARRANTOR OF TITLE MAY BE VOUCHERED TO PROSECUTE EVICTOR. See WARRANTY, 1.

PARTNERSHIP.

1. ULTIMATE FACTS SHOWING PARTNERSHIP AS BETWEEN PARTNERS. As between partners the ultimate facts whence a partnership is deduced are first, the agreement, and second, its execution; summed up as the executed agreement: there can be no partnership between parties, so far as they solely are concerned, without a consent thereto and fulfillment thereof. *Groves v. Tallman*, 178.

ACTION AGAINST MINING PARTNER FOR SPECIFIC INTEREST—MATTER IN ISSUE. See MINES, 6.

COMPLAINT TO DISSOLVE PARTNERSHIP—NECESSARY ALLEGATIONS. See PLEADING, 6, 7.

PATENT.

1. TITLE OF PATENTEE OF PUBLIC LAND UNAFFECTED BY HIS PREVIOUS QUITCLAIM DEED. Where Cameron and Cullins occupied unsurveyed public land in common, and Cameron made a quitclaim deed of all his right, title, and interest therein to Cullins, but afterwards forcibly drove Cullins off the land, and himself pre-empted and obtained a patent to a portion of it—Cullins, in the meanwhile, taking no measures to pre-empt: *Held*, in an action to quiet the title of the land patented as against Cullins, that he had no claim to such land which equity could be called upon to enforce. *Harden v. Cullins*, 49.

CONTRACT BETWEEN PRE-EMPTIONERS—RULE IN *ROSE v. TREADWAY*, 4 NEV. 455. See LAND, 1.

PLACE OF TRIAL.

[See VENUE.]

PLEADING.

1. **INSUFFICIENT DENIAL**—"DE MINIBUS." Where a complaint in replevin alleged the value of the property taken on June 22, 1870, to be five hundred and seventy dollars, and the answer denied "that the property in the complaint described is or was, on said June 22, 1870, of the value of five hundred and seventy dollars" and the court, without any testimony on the subject, found the value as alleged: *Held*, that the pleadings justified a finding of any sum less than five hundred and seventy dollars, and that, if by finding that exact amount, any error occurred, it was of that infinitesimal character which could do no injury. *Blackie v. Cooney*, 41.
2. **AMENDED COMPLAINT ENTIRELY SUPERSEDES ORIGINAL.** An amended complaint entirely supersedes the original, so that matter contained in the original and not in the amended one can not be considered by way of affirmative statement. *McFadden v. Ellsworth Mill and M. Co.*, 57.
3. **OBJECTIONS TO DEFECTIVE PLEADING—WHEN AND HOW TO BE TAKEN.** Where a party relying upon a pre-emption right pleaded the facts giving such right so defectively that a demurrer to it would clearly have been sustained; but the opposite party, instead of demurring, made up an issue as of fact on such pleading, and on the trial objected to proof of the facts on the ground of insufficiency of the plea: *Held*, that the practice of making up an issue as of fact in this way and then attempting to take advantage of the unwary pleader, by motion or objection on the trial, was reprehensible, and that the exclusion of the evidence offered under such circumstances was error. *Treadway v. Wilder*, 91.
4. **ALLEGATION BY WAY OF RECITAL—GENERAL DEMURRER INSUFFICIENT.** If a complaint states a substantial allegation only by way of recital, the defect should be objected to specifically and can not be taken advantage of on general demurrer. *Winter v. Winter*, 129.
5. **PRESCRIPTIVE TITLE—"CLAIM OR COLOR OF RIGHT."** A complaint setting forth that defendant for upwards of five years has been diverting and using water belonging to plaintiff, does not allege a prescriptive right in defendant, there being no allegation that such diversion and use was under claim or color of right. *Winter v. Winter*, 129.
6. **COMPLAINT TO DISSOLVE PARTNERSHIP—EXECUTED PARTNERSHIP AGREEMENT TO BE ALLEGED.** Where a complaint for dissolution of a partnership alleged that on a certain day the parties were partners doing a certain business and owning the property and entitled to share the profits and losses in a certain ratio; but there was no allegation of any executed partnership agreement between them: *Held*, on demurrer, that such complaint did not state facts sufficient to constitute a cause of action. *Groves v. Tallman*, 178.
7. **ALLEGATION OF PARTNERSHIP IN ACTION TO DISSOLVE.** In a suit to dissolve a partnership: *Held*, on demurrer, that the allegation that the parties were partners was an allegation of a conclusion of law. *Groves v. Tallman*, 178.

8. DEFENSE TO BE CONFINED TO ISSUE RAISED BY PLEADINGS. In a suit to compel the conveyance of certain mining ground, where defendant relied upon an answer that plaintiff was not the owner or entitled to a conveyance: *Held*, that the defense must be confined to the matter set up in such answer. *Welland v. Huber*, 203.
9. ACTION NOT MAINTAINABLE BY MARRIED WOMAN PLAINTIFF WITHOUT PROPER AVERMENTS. In a suit by W. P. and Olive Warren for diversion of water, where it appeared on the trial that Olive was the wife of one Haven and the complaint was amended by substituting her true name but without adding any averments of her right to sue alone: *Held*, that the admission of evidence on such an amended complaint against defendants' objection was error. *Warren v. Quill*, 218.
10. COMPLAINT ON MECHANICS' LIENS—OMISSION OF ALLEGATION OF TIME OF FILING. Where a complaint to foreclose mechanics' liens failed to show that they were filed within six months before the commencement of the action: *Held*, that the omission was one which should be taken advantage of by demurrer, and that after issue joined and decision rendered on the merits the pleading would be upheld by every legal intendment. *Skyrme v. Occidental Mill and M. Co.*, 219.
11. SUFFICIENCY OF COMPLAINT TO FORECLOSE MECHANICS' LIENS. The sufficiency of a complaint for foreclosure of mechanics' liens is to be determined by the statute; and if there is a substantial compliance with the requirements of the statute it is sufficient. *Skyrme v. Occidental Mill and M. Co.*, 219.
12. EQUITABLE CHARACTER OF ACTION NOT DESTROYED BY ANSWER DENYING TITLE. Where a complaint is of an equitable nature, such as in a suit to quiet title to the use of water, the mere fact that the answer raises questions as to the plaintiff's right of property does not destroy the equitable character of the action. *Lake v. Tolles*, 285.
13. PLEADING OF CONCLUSION OF LAW—NO NEED OF DENIAL. Where a complaint for an injunction to prevent the removal of a county seat in accordance with a special statute (Stats. 1873, 59) alleged that "said act is a special law in a case where a general law of uniform operation throughout the State exists and can be made applicable": *Held*, that such allegation stated a mere conclusion of law and defendant was not required to answer it. *Evans v. Job*, 322.

TECHNICAL DEFECTS OF PLEADING—OPPORTUNITY TO AMEND TO BE AFFORDED.
See AMENDMENTS, 1.

GRAVAMEN OF COMPLAINT CHARGING "FORCIBLE AND UNLAWFUL ENTRY." See FORCIBLE ENTRY AND DETAINER, 2.

GIST OF ACTION FOR "FORCIBLE ENTRY AND UNLAWFUL DETAINER." See FORCIBLE ENTRY AND DETAINER, 4.

ULTIMATE FACTS SHOWING PARTNERSHIP AS BETWEEN PARTNERS. See PARTNERSHIP, 1.

RIGHT TO ANSWER AFTER DEMURRER OVERRULED NOT ABSOLUTE. See PRACTICE, 1.

POSSESSION.

POSSESSION AS AGAINST TOWN-SITE TRUSTEE'S DEED. See EJECTMENT, 2.

IN EJECTMENT ON PRIOR POSSESSION, SUCH POSSESSION MUST BE SHOWN. See EJECTMENT, 3.

RIGHTS OF RAILROADS TO EXCLUSIVE POSSESSION OF RAILROAD LANDS. See RAILROADS, 3.

EFFECT OF DEED UNDER CONGRESSIONAL TOWN-SITE ACT AS AGAINST POSSESSOR. See TOWN-SITE, 1.

MERE POSSESSOR OF PUBLIC LAND HAS NO RIPARIAN RIGHTS. See WATER RIGHTS, 2.

PRACTICE.

1. RIGHT TO ANSWER AFTER DEMURRER OVERRULED NOT ABSOLUTE. Where a demurrer to a complaint was overruled and judgment rendered for plaintiff, there being neither showing nor suggestion of a defense on the merits: *Held*, that defendant was not entitled as a matter of absolute right to answer. *Winter v. Winter*, 129.
2. WRIT OF RESTITUTION, WHEN ISSUED BY SUPREME COURT. Where the Supreme Court on *certiorari* annulled the proceedings of a district court under which the relator had been turned out of possession of certain property: *Held*, that in addition to annulling the proceedings of the court below, the Supreme Court could properly issue a writ of restitution to restore the relator to possession—such writ being necessary and proper to the complete exercise of its appellate jurisdiction. *Peacock v. Leonard, on motion*, 247.

TECHNICAL DEFECTS OF PLEADING—OPPORTUNITY TO AMEND TO BE AFFORDED. See AMENDMENTS, 1.

AMENDMENT OF JUDGMENT OF SUPREME COURT. See AMENDMENTS, 2.

JUDGMENT TO BE AFFIRMED UPON NEGLECT TO ARGUE APPEAL. See APPEAL, 4.

NOTICE OF APPEAL MUST BE FILED BEFORE COPY SERVED. See APPEAL, 10.

OBJECTIONS NOT CONSIDERED WHEN NOT PROPERLY PRESENTED. See APPEAL, 12.

COSTS IN EQUITY—SPECIFIC PERFORMANCE CASES. See COSTS, 2.

"DEFAULT" NOT NECESSARY TO SUPPORT JUDGMENT AFTER DEMURRER OVERRULED. See DEFAULT, 1.

DEFENSE TO EJECTMENT ON TOWN-SITE TRUSTEE'S DEED. See EJECTMENT, 2.

NO ERROR IN EXCLUDING IMMATERIAL EVIDENCE. See EVIDENCE, 1.

REFUSAL TO SETTLE EXCEPTIONS TO BE PROPERLY EXCEPTED TO. See EXCEPTIONS, 1.

NO STRICT RIGHT TO JURY TRIAL IN EQUITY CASE. See JURY, 5.

NO ERROR TO REFUSE JURY WHERE NO STRICT RIGHT THERETO. See JURY, 6.

OBJECTIONS TO DEFECTIVE PLEADING, WHEN AND HOW TO BE TAKEN. See PLEADING, 3.

DEFENSE TO BE CONFINED TO ISSUE RAISED BY PLEADINGS. See PLEADING, 8.

SERVICE BY MAIL, WHEN COMPLETE. See SERVICE, 1.

ACTION AGAINST COUNTY IN OTHER DISTRICT—WAIVER OF CHANGE OF VENUE. See VENUE, 1.

WARRANTOR OF TITLE MAY BE VOUCHERED TO PROSECUTE EVICTOR. See WARRANTY, 1.

PRACTICE ACT.

SECTION 131—ORDER UPON DEFENDANT TO DELIVER UP STOCK. See ATTACHMENT, 1, 2.

SECTIONS 412 AND 414—CERTIFICATE OF COMMISSIONER TO DEPOSITION. See DEPOSITIONS, 2.

NEW TRIAL STATEMENT NEED NOT DESIGNATE GENERAL GROUNDS, See STATEMENT, 1.

PRE-EMPTION.

CONTRACTS BETWEEN PRE-EMPTIONERS—RULE IN ROSE v. TREADWAY, 4 NEV. 455. See LAND, 1.

PRESUMPTIONS.

1. PRESUMPTION AS TO LAWS OF OTHER STATES. In the absence of proof of the laws of another state they will be presumed to be the same as in this State. *Rogers v. Hatch*, 35.

2. **PRESUMPTION OF CONSTITUTIONALITY OF LOCAL OR SPECIAL LAW.** Where a local or special law has been passed in reference to a matter affecting a portion only of the people, it will be presumed to be valid until facts are presented showing beyond any reasonable doubt that a general law is applicable. *Evans v. Job*, 322.
3. **PRESUMPTION IN FAVOR OF SPECIAL AS AGAINST GENERAL STATUTE.** The mere fact that a general law has been passed providing for the removal of county seats is not proof that it is applicable to a particular case; and if a special act be passed for the particular case, the presumption of the applicability of the general law is overcome by the presumption, in favor of the special act, that the general act was not applicable in that case. *Evans v. Job*, 322.

PRESUMPTIONS IN FAVOR OF ORDER GRANTING NEW TRIAL. See **APPEAL**, 3.

PRESUMPTION IN FAVOR OF INSTRUCTIONS, WHERE EVIDENCE NOT APPEALED. See **CHARGE**, 4.

PRESUMPTION AGAINST INSTRUCTIONS REFUSED. See **CHARGE**, 6.

SERVICE OF SUMMONS—CONTRADICTION IN RECORD—PRESUMPTIONS. See **SUMMONS**, 1.

OMISSION OF "DOLLAR MARK" IN TAX ASSESSMENT ROLL—PRESUMPTION. See **TAXES**, 2.

PROMISSORY NOTE.

EFFECT OF TAKING AND ASSIGNING NOTE UPON MECHANIC'S LIEN. See **MECHANIC'S LIEN**, 7.

RAILROADS.

1. **REPORT OF COMMISSIONERS TO "SET FORTH THEIR PROCEEDINGS."** A report of commissioners, appointed to assess the value of lands to be taken for railroad purposes as provided by law (Stats. 1864-5, 427, Sec. 80), which fails to show that they or a majority of them met at the time and place ordered and before entering on their duties were duly sworn, as required by the law, is not sufficient; and it is error to confirm such a report. *Virginia and Truckee R. R. Co. v. Lovejoy*, 100.
2. **APPRAISAL OF LAND TAKEN BY RAILROAD AFTER ORIGINAL CONSTRUCTION.** It seems that when land is condemned for a railroad after its original construction, the owner is entitled to the actual market value of the property at the time of taking, without deduction for any appreciation in value caused by the previous location and construction of the road. *Virginia and Truckee R. R. Co. v. Lovejoy*, 100.

3. **RIGHTS OF RAILROADS TO EXCLUSIVE POSSESSION OF RAILROAD LANDS.** A railroad company has the right to the possession of the land taken for the purpose of its road, and that possession is the right to its exclusive enjoyment, and to exclude all persons and beasts therefrom at any and all times. *Walsh v. Virginia and Truckee R. R. Co.*, 110.
4. **RAILROADS NEED NOT FENCE ON PUBLIC LAND.** Our railroad law (Stats. 1864-5, 427, Sec. 40) does not require railroad companies to fence their road where it runs through public land. *Walsh v. Virginia and Truckee R. R. Co.*, 110.
5. **RAILROAD, WHEN LIABLE FOR KILLING STRAYING CATTLE.** If cattle stray upon a railroad directly from the land of their owner, and by reason of the failure on the part of the company to fence their road at that point, and are killed, the company would be held liable under the railroad act (Stats. 1864-5, 427, Sec. 40) on a simple showing of the facts of such killing and neglect to fence, without any further showing of negligence; but it is otherwise if they stray from public land or from land not belonging to their owner. *Walsh v. Virginia and Truckee R. R. Co.*, 110.
6. **CONDEMNATION OF LAND FOR RAILROADS—"DAMAGES TO RESIDUE OF PREMISES."** Although the statute in reference to making compensation for lands condemned for railroad purposes (Stats. 1864-5, 427, Sec. 30) does not, technically speaking, allow for damages to the residue of premises from which a portion only is taken, yet such damages are a proper element of estimate in arriving at the "just compensation" which must be awarded to the owner of the land taken. *Virginia and Truckee R. R. Co. v. Henry*, 165.
7. **"GOOD CAUSE" TO SET ASIDE COMMISSIONERS' REPORT.** The "good cause" for which the statute provides a report of commissioners appointed to appraise compensation for land taken for railroad purposes may be set aside (Stats. 1864-5, 427, Sec. 31), means something clear and indubitable, pointing error in law or fact, intentional or unintentional on the part of the commissioners. *Virginia and Truckee R. R. Co. v. Henry*, 165.

CONDEMNATION OF LAND FOR RAILROAD AFTER ORIGINAL CONSTRUCTION. See **EMINENT DOMAIN**, 1.

VERBAL ERRORS IN REPORT OF COMMISSIONERS OF APPRAISAL. See **EMINENT DOMAIN**, 2.

"COMPENSATION FOR LAND TAKEN" IS NOT MERE "MARKET VALUE." See **EMINENT DOMAIN**, 3, 5.

ACTION AGAINST RAILROAD FOR NEGLIGENCE IN KILLING CATTLE—BURDEN OF PROOF. See **EVIDENCE**, 4.

CONSTRUCTION OF RAILROAD LAW AS TO FENCES. See **FENCES**, 1.

LIABILITY OF RAILROADS FOR KILLING DOMESTIC ANIMALS. See **NEGLECT**, 1, 2.

RATIFICATION.

RATIFICATION OF ACT OF UNAUTHORIZED AGENT. See AGENCY, 1.

RECORD.

AMENDMENTS AT SUBSEQUENT TERM BY THE RECORD. See AMENDMENTS, 2.

PAPERS NOT NOTICED ON APPEAL UNLESS PART OF RECORD. See APPEAL, 8.

OBJECTIONS NOT CONSIDERED ON APPEAL WHEN NOT PROPERLY PRESENTED.
See APPEAL, 12.

JUDGMENT ROLL IN CERTIORARI CASES. See CERTIORARI, 2.

CRIMINAL LAW—CHARGE NOT PART OF RECORD. See CHARGE, 3, 5, §

NO OBJECTION TO COST BILL ON APPEAL UNLESS MADE PART OF RECORD.
See COSTS, 1.

CLERK'S MINUTES OF PEREMPTORY CHALLENGES NOT PART OF RECORD. See
CRIMINAL LAW, 3.

**APPEAL FROM ORDER SUSTAINING DEMURRER TO INDICTMENT—RECORD, HOW
MADE.** See CRIMINAL LAW, 17.

RECITAL OF LEGAL SERVICE OF SUMMONS IN JUDGMENT. See JUDGMENT, 3.

SERVICE OF SUMMONS—CONTRADICTION IN RECORD—PRESUMPTIONS. See SUM-
MONS, 1.

REMITTITUR.

APPEAL FROM JUDGMENT UPON REMITTITUR NOT ENTERTAINED. See APPEAL, 9.

RENT.

ACTION FOR RENT BY PARTY OTHER THAN LESSOR—INTERPLEADER. See INTER-
PLEADER, 1.

ACTION FOR RENT—LESSEE CANNOT DEFY LESSOR'S TITLE. See LANDLORD AND
TENANT, 1.

REPLEVIN.

INTEREST AS DAMAGES IN REPLEVIN CASES. See DAMAGES, 1.

JUDGMENT IN REPLEVIN NOT ANNULLED FOR INFINITESIMAL ERROR. See PLEADING, 1.

REPORTS.

CONDEMNATION OF LAND—VERBAL ERRORS IN COMMISSIONERS' REPORT. See EMINENT DOMAIN, 2.

REPORT OF COMMISSIONERS—OMISSION OF TESTIMONY. See EMINENT DOMAIN, 6.

REPORT OF COMMISSIONERS TO "SET FORTH THEIR PROCEEDINGS." See RAILROADS, 1.

"GOOD CAUSE" TO SET ASIDE COMMISSIONERS' REPORT. See RAILROADS, 7.

ROADS AND BRIDGES.

1. EXPIRATION OF FRANCHISE—REVERTER TO THE SOVEREIGN. At the expiration of a toll-road franchise, the control of such road reverts to the sovereign; and in the absence of other special disposition, the free use of such road would be thereafter in the people. *State ex rel. Boardman v. Lake*, 276.
2. TOLL-ROAD WITH EXPIRING FRANCHISE NOT TO BE LOCATED AS NEW ROAD. Sections 1 and 2 of the act to provide for the constructing and maintaining toll-roads (Stats. 1864-5, 254) apply only to new roads, and give no right to the owner of an old road, whose franchise is about expiring, to locate it as a new road. *State ex rel. Boardman v. Lake*, 276.
3. TOLL-ROAD A "ROAD IN GENERAL USE BY TRAVELING PUBLIC." The phrase "road or highway now in general use by the traveling public," as employed in the toll-road act of 1865 prohibiting interference therewith (Stats. 1864-5, 254, Sec. 12), includes toll-roads—there being no difference in the sense of the statute between such roads and common highways. *State ex rel. Boardman v. Lake*, 276.
4. EXPIRED BRIDGE FRANCHISE—RIGHTS OF FRANCHISEE AS LAND-OWNER. The fact that the holder of an expired toll-road and bridge franchise has acquired the fee of the land on which the ends of the bridge rest and both sides thereof, does not give him any rights to a continuance of the franchise—the possession by the public of the easement of traveling the road being in no sense antagonistic to his possession of the title to the land. *State ex rel. Boardman v. Lake*, 276.
5. MERGER OF CLAIMS TO EASEMENT BY ACCEPTANCE OF FRANCHISE. Where Lake, claiming to own a perpetuity of franchise to collect toll on the Fuller bridge over the Truckee River, accepted the new toll-road franchise for ten years granted by act of December 17, 1862 (Stats. 1862, 19): *Held*, that whatever rights he may have previously held were merged in the statutory contract contained in that act by his assent thereto. *State ex rel. Boardman v. Lake*, 276.

6. TOLL-BRIDGE OVER NAVIGABLE RIVER MUST BE AUTHORIZED BY LEGISLATURE. A bridge over a navigable stream, such as the Fuller bridge over the Truckee River, can only be lawfully built or used for taking tolls by authority of the legislature. *State ex rel. Boardman v. Lake*, 276.

STATUTORY CONTRACT OF DEDICATION BY ACCEPTANCE OF FRANCHISE. See DEDICATION, 1.

SALE.

SALE OF MINE BY ANOTHER THAN USUAL NAME. See MINES, 2.

SENTENCE.

POSTPONEMENT OF SENTENCE IN CASE OF ESCAPE—SENTENCE AT SUBSEQUENT TERM. See CRIMINAL LAW, 13, 14.

SERVICE.

1. SERVICE BY MAIL, WHEN COMPLETE. Where an affidavit of service of copy of notice of appeal by mail stated that it was deposited in the post-office at Dayton on a certain day, directed to the proper person to be served at Carson and postage paid: *Held*, that the service, if proved at all, was a service on the day of such deposit. *Lyon County v. Washoe County*, 177.

NOTICE OF APPEAL MUST BE FILED BEFORE COPY SERVED. See APPEAL, 10.

RECITAL OF LEGAL SERVICE OF SUMMONS IN JUDGMENT. See JUDGMENT, 3.

SERVICE OF SUMMONS—CONTRADICTION IN RECORD—PRESUMPTIONS. See SUMMONS, 1.

SHERIFF.

1. SHERIFF'S FEES IN DELINQUENT TAX SUITS. A sheriff cannot collect from a county his fees in delinquent tax cases commenced previous to the act of March 1, 1871, which provides for suits in which his fees shall under certain circumstances be so paid (*Stats. 1871, 93*)—such act not having any retroactive effect. *Fitch v. Elko County*, 271.

SPECIFIC PERFORMANCE.

ACTION FOR SPECIFIC PERFORMANCE—PREVIOUS DEMAND A MATTER OF COSTS. See DEMAND, 1.

RIGHT TO SPECIFIC PERFORMANCE WITHOUT PREVIOUS DEMAND. See EQUITY, 1.

STATEMENT.

1. NEW TRIAL STATEMENT NEED NOT DESIGNATE GENERAL GROUNDS. A statement on motion for new trial need not designate the general grounds of error relied on, but only specify the particulars wherein the error lies—the Practice Act requiring the notice to designate the general grounds, and the statement to contain the specifications. *Worthing v. Cutts*, 118.

IRRELEVANT MATTER IN "STATEMENTS" OF PROCEEDS OF MINES. See TAXES, 4.

STATUTES.

WHEN GENERAL LAWS ARE "APPLICABLE" IN CONSTITUTIONAL SENSE. See CONSTITUTION, 1, 2, 3.

LEGISLATIVE INTENT OF ACT TO TAX NET PROCEEDS OF MINES. See CONSTRUCTION, 1.

STATUTE OF TWO CONSTRUCTIONS. See CONSTRUCTION, 2.

CONSTRUCTION OF MECHANICS' LIEN LAWS. See CONSTRUCTION, 3.

STATUTORY CONSTRUCTION—PLAIN OBJECT OF LAW. See CONSTRUCTION, 4.

NEW STATUTES APPLY TO NEW CASES. See CONSTRUCTION, 5.

CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE. See CONSTRUCTION, 7.

STATUTE GOOD IN PART AND BAD IN PART. See CONSTRUCTION, 8.

STATUTE RELATING TO SUITS AGAINST COUNTIES—VENUE. See COUNTIES, 1.

STATUTE AUTHORIZING COUNTY COMMISSIONERS TO EMPLOY "EXTRA COUNSEL." See COUNTY COMMISSIONERS, 1.

STATUTE RELATING TO ELECTION IN EUREKA COUNTY. See COUNTY COMMISSIONERS, 2.

ACT FOR REMOVAL OF HUMBOLDT COUNTY SEAT NOT UNCONSTITUTIONAL. See COUNTY SEATS, 1.

STATUTORY PROVISION TO PREVENT LOSS OF COURT TERM. See COURTS AND JUDGES, 1, 2.

STATUTORY PROVISIONS RELATING TO CHARGES IN CRIMINAL CASES. See CRIMINAL LAW, 1.

STATUTORY PROVISIONS RELATING TO BILLS OF EXCEPTION IN CRIMINAL CASES. See CRIMINAL LAW, 2.

STATUTORY CONTRACT OF DEDICATION BY ACCEPTANCE OF FRANCHISE. See DEDICATION, 1.

STATUTES AS TO TERM OF DISTRICT ATTORNEY HOLDING BY APPOINTMENT. See DISTRICT ATTORNEY, 1, 2.

EFFECT OF STATUTE AS TO TOWN-SITE TRUSTEE'S DEED. See EJECTMENT, 2.

STATUTE PROVIDING FOR COMPENSATION FOR LAND TAKEN FOR RAILROADS. See EMINENT DOMAIN, 3.

CONSTRUCTION OF RAILROAD LAW AS TO FENCES. See FENCES, 1.

REQUISITES OF NEW PROMISE UNDER STATUTE OF LIMITATIONS. See LIMITATIONS, 2, 3.

EFFECT OF NEW LAW ON OLD MECHANIC'S LIEN. See MECHANIC'S LIEN, 4.

MECHANICS' LIEN LAW TO BE LIBERALLY CONSTRUED. See MECHANIC'S LIEN, 8.

PRESUMPTION AS TO LAWS OF OTHER STATES. See PRESUMPTIONS, 1.

PRESUMPTION IN FAVOR OF SPECIAL AS AGAINST GENERAL STATUTE. See PRESUMPTIONS, 2, 3.

STATUTE AS TO REPORTS OF COMMISSIONERS ON CONDEMNATION OF LAND. See RAILROADS, 1, 6, 7.

STATUTE PROHIBITING INTERFERENCE WITH ROADS IN GENERAL USE. See ROADS AND BRIDGES, 2, 3.

CONSTRUCTION OF STATUTE PROVIDING MANNER OF TAXING PROCEEDS OF MINES. See TAXES, 1, 4, 5, 6.

STATUTE RELATING TO DELINQUENT TAX SUITS—WHEN FEES PAYABLE BY COUNTY. See TAXES, 7.

STAY OF EXECUTION.

ACTION ON JUDGMENT PENDING APPEAL—WHEN NO STAY. See APPEAL, 1.

STIPULATION.

EFFECT OF STIPULATION TO TAKE DEPOSITION AS ADMISSION. See DEPOSITION, 1.

STOCK.

CONVERSION OF MINING STOCK—"HIGHEST MARKET PRICE" NOT TRUE RULE OF DAMAGES. See DAMAGES, 5.

MINING STOCK TRANSACTIONS—BROKERS NEED NOT DELIVER IDENTICAL STOCK PURCHASED. See MINES, 9.

PROPERTY IN MINING STOCK—WHAT. See MINES, 10.

SUMMONS.

1. SERVICE OF SUMMONS—CONTRADICTION IN RECORD—PRESUMPTIONS. Where on appeal from a judgment by default, the record indicated that the summons had been served after it had been filed, but the judgment recited that the default was entered "upon due proof of the service of summons and copy of complaint as required by law": *Held*, that every legal intendment was in favor of the validity of the judgment. *Blasdel v. Kean*, 305.

SURETIES.

LIABILITY ON OFFICIAL BOND OF APPOINTED DISTRICT ATTORNEY. See BOND, 1.

LIABILITY ON OFFICIAL BOND OF "DE FACTO" OFFICER. See BOND, 2.

LIABILITY ON INDEMNITY BOND AGAINST "LIABILITY." See BOND, 3.

GOLD COIN JUDGMENT FOR LIABILITY ON INDEMNITY BOND. See GOLD COIN, 1.

TAXES.

1. TAXES ON PROCEEDS OF MINES—WHEN THE "FIFTEEN DOLLARS PER TON" EXEMPTION APPLIES. The Act of February 28, 1871, for the taxation of the net proceeds of mines (Stats. 1871, 87), in providing "that an additional exemption of fifteen dollars per ton may be allowed on all ores worked by Freiberg or dry process," does not authorize an exemption of fifteen dollars per ton on all ores so worked in addition to the actual cost of working them, but only where such actual costs exceed sixty per cent. of the gross yield. *State v. Eureka Consolidated M. Co.*, 15.
2. OMISSION OF "DOLLAR MARK" IN TAX ASSESSMENT ROLL. In an action to recover delinquent taxes on the net proceeds of mines, where plaintiff was allowed to introduce in evidence the original assessment roll, notwithstanding there was no dollar mark attached to the figures purporting to indicate the amount of the tax due or assessed, and it was objected to on that ground: *Held*, that the fair and reasonable presumption, in the absence of anything to show to the contrary, was that the figures, disposed in perpendicular columns in the form prescribed by statute, indicated dollars and cents, and that the admission of the roll in evidence was not error. *State v. Eureka Consolidated M. Co.*, 15.
3. SUFFICIENCY OF DELINQUENT TAX ASSESSMENT ROLL. Where a delinquent assessment roll, objected to for want of the "dollar-mark," had such mark prefixed to all the columns except the last, headed "total amount of tax," which,

however, was added up and the mark prefixed to the sum total: *Held*, that such roll furnished sufficient legal evidence to enable a court to determine with certainty the amount of the tax, and that in a suit for delinquency such roll was all the plaintiff need introduce to make out a *prima facie* case. *State v. Eureka Consolidated M. Co.*, 15.

4. **IRRELEVANT MATTER IN "STATEMENTS" OF PROCEEDS OF MINES.** Matters inserted in a statement of the proceeds of a mine such as is required to be furnished by the mining tax law (Stats. 1871, 87), the insertion of which is not authorized by the statute, go for nothing and the assessor is not bound to pay any regard to them. *State Eureka Consolidated M. Co.* 15.
5. **OBJECT OF NOTICE BY ASSESSOR OF UNPAID TAXES ON MINES.** The written notice required by section 7 of the mining tax law (Stats. 1871, 87), to be given by the assessor to parties engaged in reducing ores, is not a prerequisite to liability of the producer for the tax, but only intended to hold a party reducing ores extracted by others to the extent of the value of the ores in his possession when notified. *State v. Eureka Consolidated M. Co.*, 15.
6. **TAXES ON PROCEEDS OF MINES TO BE COLLECTED QUARTERLY.** There is nothing in the use of the word "manner" in section 10 of the mining tax law, (Stats. 1871, 87) which provides that the collection shall be enforced in the same manner as on other kinds of personal property, to prevent the collection of such taxes quarterly—the word "manner" as there used does not mean "time." *State v. Eureka Consolidated M. Co.*, 15.
7. **DELINQUENT TAX SUITS—WHEN FEES PAYABLE BY COUNTY.** The act of March 1, 1871, amending the revenue laws in reference to delinquent tax suits (Stats. 1871, 93), contemplates the payment of fees out of the county treasury only in cases in which suits are brought by direction of the county commissioners. *Fitch v. Elko County*, 271.

LEGISLATIVE INTENT OF ACT TO TAX NET PROCEEDS OF MINES. See **CONSTRUCTION**, 1.

"VALUE" SWORN BEFORE ASSESSOR NOT EVIDENCE OF VALUE ON CONDEMNATION. See **EMINENT DOMAIN**, 4.

SHERIFF'S FEES IN DELINQUENT TAX SUITS. See **SHERIFF**.

TIME.

TIME FOR APPEAL FROM ORDER REFUSING TO SET ASIDE JUDGMENT. See **APPEAL**, 7.

TIME OF SETTLEMENT OF BILL OF EXCEPTIONS IN CRIMINAL CASES. See **CRIMINAL LAW**, 2.

TIME FOR SENTENCE IN CRIMINAL CASES. See **CRIMINAL LAW**, 14.

MEANING OF WORD "WEEK." See **DEFINITIONS**, 4.

NO LEGAL TERM OF COURT EXCEPT AT TIME PRESCRIBED. See JURISDICTION, 5.

COMPLAINT ON MECHANIC'S LIEN—OMISSION OF ALLEGATION OF TIME OF FILING.
See PLEADING, 10.

SERVICE BY MAIL, WHEN COMPLETE. See SERVICE, 1.

TOLLS.

[See ROADS AND BRIDGES.]

TOWN-SITE.

1. EFFECT OF DEED UNDER CONGRESSIONAL TOWN-SITE ACT. It seems that a deed made by a trustee purporting to act under the law of congress of May 23, 1844, providing for the disposition of town-sites to the occupants is not conclusive in its effect; and if given to one not an occupant or having the right of occupancy as contemplated, that fact may be shown and the deed in such case will fall, as absolutely void and of no effect. *Treadway v. Wilder*, 91.

DEFENSE TO EJECTMENT ON TOWN-SITE TRUSTEE'S DEED. See EJECTMENT, 2.

TRANSCRIPT.

[See RECORD.]

TROVER.

TROVER—MEASURE OF DAMAGES. See DAMAGES, 4.

TROVER FOR MINING STOCK AGAINST ASSIGNEES FOR BENEFIT OF CREDITORS.
See MINES, 8.

UNITED STATES.

EFFECT OF DEED UNDER CONGRESSIONAL TOWN-SITE ACT. See TOWN-SITE, 1.

USE.

BARGAIN AND SALE DEED—OPERATION OF STATUTE OF USES. See DEED, 3.

CONSTRUCTION OF DEED OF LAND "AND ALSO PRIOR RIGHT TO USE" WATER.
See DEED, 5.

PRESRIPTIVE RIGHT TO USE OF WATER, REQUISITES OF. See PLEADING, 5.

RIGHT TO USE OF WATER AS DISTINCT FROM LAND. See WATER RIGHTS, 1.

UTAH.

No "UTAH TERRITORY JUDGE" IN NEVADA TERRITORY. See OFFICES AND OFFICERS, 2.

VACANCY.

LIABILITY ON OFFICIAL BOND OF DISTRICT ATTORNEY APPOINTED TO FILL VACANCY. See BOND, 1.

APPOINTMENT NOT TO INTERFERE WITH REGULAR TERM OF OFFICER ELECTED.
See OFFICES AND OFFICERS, 1.

VENUE.

1. ACTION AGAINST COUNTY IN OTHER DISTRICT—WAIVER OF CHANGE OF VENUE.
Where a county was sued in a judicial district of which it did not form a part, but it appeared and answered without presenting any objection to the jurisdiction: *Held*, that it thereby waived its right to a change of venue and trial in its own judicial district. *Clarke v. Lyon County*, 181.

LARCENY OF CATTLE STOLEN IN ONE COUNTY AND DRIVEN TO ANOTHER—VENUE.
See CRIMINAL LAW, 4, 5.

VERDICT.

SEPARATION OF JURY—WHEN NOT PREJUDICIAL. See JURY, 1.

CONVERSATION OF ATTORNEY WITH JUROR—WHEN NOT PREJUDICIAL. See JURY, 2.

ATTORNEY SENDING FOR MEDICINE FOR JUROR DOES NOT VITIATE. See JURY, 3.

WAIVER.

ACTION AGAINST COUNTY IN OTHER DISTRICT—WAIVER OF CHANGE OF VENUE.
See VENUE, 1.

WARRANTY.

1. BREACH OF WARRANTY OF TITLE—VOUCHER OF WARRANTOR. In case of warranty of title, where there has been an eviction, the party evicted upon suing the evictor may notify his warrantor of the commencement of such action and require him to assist in its prosecution; and in such case the warrantor will be bound by the proceedings; but to have such effect the notice should be unequivocal, certain and explicit; and a mere notice before suit of an intention to sue and to insist upon the warranty is not sufficient. *Dalton v. Bowker*, 190.
2. WARRANTOR OF TITLE MAY BE VOUCHERED TO PROSECUTE EVICTOR. When the vendor of land with warranty of title is properly notified of the pendency of an action by the vendee to recover it from an evictor and afforded an opportunity to assist in the prosecution, he becomes in effect the real party in interest; the same as if the vendee were the defendant in the action and the vendor were vouched to defend. *Dalton v. Bowker*, 190.

MEASURE OF DAMAGES ON BREACH OF WARRANTY. See DAMAGES, 2.

DAMAGES, ON WARRANTY, FOR EVICTION—PRESENT VALUE NOT RELEVANT. See DAMAGES, 3.

WARRANTY OF TITLE—EVIDENCE OF EVICTION AND OF SUPERIOR TITLE. See EVIDENCE, 6.

WATER RIGHTS.

1. RIGHT TO USE OF WATER AS DISTINCT FROM LAND. Running water, as long as it continues to flow in its natural channel, can not be made the subject of private ownership except as a right incident to property in land; but a right may be acquired to its use by appropriation, which will be regarded and protected as property. *Dalton v. Bowker*, 190.
2. MERE POSSESSOR OF PUBLIC LAND HAS NO RIPARIAN RIGHTS. A mere possessor of unsurveyed government land has no riparian rights to the use of a stream of water flowing through it. *Lake v. Tolles*, 285.

CONSTRUCTION OF DEED OF LAND "AND ALSO PRIOR RIGHT TO USE" WATER.
See DEED, 5.

PREScriptive TITLE TO USE OF WATER, REQUISITES OF. See PLEADING, 5.

WITNESS.

1. PRACTICE ACT, SEC. 379—MEANING OF “REPRESENTATIVE OF DECEASED PERSON.”
Where a person was employed by another to work at a quartz mill for an association, to whom such latter person had assigned a lease thereof; and after the death of the assignor, the employee sued the association for work and labor: *Held*, that none of the association was sued as the representative of deceased, and there was nothing in section 379 of the Practice Act to prevent plaintiff from testifying as to the conversation and employment by deceased. *Fullon v. Day*, 80.

DEPENDANT IN ATTACHMENT AS WITNESS ON ORDER OF EXAMINATION. See ATTACHMENT, 2.





